

Client Choice for Indigent Criminal Defendants: Theory and Implementation

Stephen J. Schulhofer*

“We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise.”¹

With rare exceptions, existing systems for effectuating the indigent criminal defendant’s right to counsel² range from disappointing to scandalously inadequate.³ Inadequate funding is the most prominently mentioned concern, but often it is merely a symptom of a deeper problem of institutional structure, an Achilles’ heel that weakens almost all indigent defense systems, whether poorly funded or not.

For financial resources and other essentials, counsel for the indigent—including public defenders, appointed private counsel and lawyers who serve under the “contract” system—are typically beholden to the agency of government (in most cases local government) that foots the bill,⁴ to court administrators or even to

* Robert B. McKay Professor of Law, New York University. I am grateful for the extensive discussion, collaboration and comments of Jim Bethke, Edwin Colfax and Norman Lefstein; for the comments of Stephen Gillers, Erin Murphy, Carol Steiker, and Kim Taylor-Thompson; and for the research assistance of Samuel Levor.

¹ Fuller v. Oregon, 417 U.S. 40, 53 (1974).

² Gideon v. Wainwright, 372 U.S. 335 (1963).

³ The subject has generated a vast literature. One scholar notes that “year after year, in study after study, observers find remarkably poor defense lawyering.” Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 221 (2004). See also Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843 (1994). For detailed discussion of the problem, see THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 80–81 (2009), available at <http://www.constitutionproject.org/manage/file/139.pdf>.

⁴ Funding is not invariably centered at the local level. Most notably, in federal cases, indigent defense is financed from the national budget and has generally been viewed as reasonably adequate. In state cases, indigent defense (or at least some portion of it, such as representation on appeal or in capital cases) is often supported by state rather than local governments. See, e.g., NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 193–205 (2011) [hereinafter LEFSTEIN, CASELOADS] (describing successful state-funded system in Massachusetts). Federal funding has also supported capital defense units that represent state death row inmates in post-conviction proceedings. These models, to the extent available, help mitigate the acute cost-control pressure that dominates when indigent defense costs are borne solely at the level of county government. But counties are widely responsible for a significant portion of indigent defense expenses, and in a number of states, county government must bear the entirety of the cost of indigent defense representation. See, e.g., David Rudovsky, *Gideon and the Effective Assistance of Counsel*:

the very judge who will try the case. Government and court officials, of course, have strong incentives to control costs. If responsibility for assigning counsel lies instead with a judge, fiscal imperatives may be buffered to a degree; the judge's aim might simply be to appoint the best advocate available. But that priority is not necessarily paramount for the judge either. A judge may (consciously or otherwise) favor the lawyer who minimizes pretrial motions and does not "rock the boat"; a judge who needs to run for re-election may (consciously or otherwise) favor the lawyer, regardless of ability, who contributes most generously to the judge's campaign fund.⁵

These constraints—grounded not only in resource limitations but also in the attorney's lack of complete independence—mean that optimally adversarial lawyering becomes a luxury that counsel for the indigent often must ration among clients rather than guarantee to all.⁶ Truncated client counseling, abbreviated factual investigation and quick disposition by guilty plea can be irresistibly tempting, whether or not a fully contested trial or a more aggressive stance in plea negotiation might best serve the client.⁷ Such triage, however well-intentioned, obviously is not always in the best interest of individual defendants, and is expressly forbidden by the American Bar Association's ethical cannons.⁸ Nonetheless, few observers doubt that it often becomes central to criminal defense practice, especially in public defender systems.

None of these criticisms stands as a reproach to the integrity and professional commitment of the lawyers who serve the poor. They almost invariably labor under difficult circumstances, for scant monetary reward, and they often achieve remarkable results by dint of intelligence, creativity, and long hours of hard work. Yet even so, systemic shortcomings grievously weaken the capacity of an indigent

The Rhetoric and the Reality, 32 LAW & INEQ. 371, 394 (2014) (reporting that Pennsylvania is now the only state that provides no state funding at all); see also LEFSTEIN, CASELOADS, *supra*, at 217 (noting primary reliance on county-level funding in California).

⁵ In Harris County (Houston) Texas, where nearly all indigent defense lawyers are selected and monitored by an elected judiciary, some attorneys have earned over \$300,000 a year from an indigent defense practice in which they enter guilty pleas for large numbers of assigned clients with whom they have minimal contact. See Charlie Baird & William S. Sessions, *Public Defender Proposal Lacks Checks and Balances*, HOUSTON CHRON. (June 9, 2010), <http://www.chron.com/default/article/Public-defender-proposal-lacks-checks-and-balances-1717664.php>; TEXAS FAIR DEFENSE PROJECT, BENEFITS OF A PUBLIC DEFENDER OFFICE 3–4 (2009), available at <http://www.texasfairdefenseproject.org/media/TFDP-Harris-County-PD-White-Paper.pdf>.

⁶ For discussion of how this dynamic differs, and how its ultimate effects are similar, in the specific context of public-defender, appointed-counsel and contract-representations systems, see text, *infra* at notes 28–58. See also Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 53 (1988) [hereinafter Schulhofer, *Discretion*] (discussing how lawyer compensation systems lead to conflict with clients); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (arguing plea bargaining system puts defense lawyers in conflict with their clients).

⁷ See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

⁸ LEFSTEIN, CASELOADS, *supra* note 4, at 26–31.

defendant's attorney to render effective assistance. The skills that top-notch indigent defense lawyering requires often must include instincts for accurate triage at least as much as dogged no-stone-unturned advocacy.⁹

Apart from these obvious departures from the initial promise of *Gideon*,¹⁰ the current situation disserves sound criminal justice policy by weakening the adversary process, increasing the risks to the innocent, raising the rate of reversals on appeal, and promoting cynicism among indigent defendants themselves.¹¹

Proposals for improvement commonly stress the need to overcome the gross inadequacy of available resources, and this indeed may be the single most important deficiency. Other efforts target measures that place the defender system's governing body directly under local government control.¹² Yet virtually every suggestion for reform takes for granted a feature of the current American system that would stand out as even more peculiar to the proverbial traveler from Mars—and even to a visiting lawyer from such less-distant worlds as England or Canada. That feature is that the American indigent defendant is never permitted to select his attorney.

Despite the Supreme Court's paean to free enterprise in *Fuller v. Oregon*,¹³ the opinion that provides my epigraph, the criminal justice system routinely and brazenly violates free-enterprise principles. To be precise, of course, it sins to this extent only in the indigent defense segment of its docket. *Fuller*'s account of how the distribution of legal assistance is "generally regulated," is not palpably false if we set aside 80% of criminal prosecutions (the context in which *Fuller* itself arose) and treat the remaining 20%, the retained-counsel cases, as typical of the whole.¹⁴

⁹ See, e.g., Pub. Defender, Eleventh Judicial Circuit v. State, 115 So. 3d 261, 274 (2013) (noting that public defenders in Miami-Dade County routinely engage in crude "triage," by giving highest priority to the most serious cases, to the disadvantage of other clients).

¹⁰ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹¹ The problem was famously captured in an exchange between an inmate and a social science researcher: "Did you have a lawyer when you went to court?" "No. I had a public defender." See Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No. I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4 (1971).

¹² ABA Standards for the defense function recommend guarantees of independence. See, e.g., 1 ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, §§ 5-1.3, 5-3.1 (2d ed. 1980) [hereinafter ABA STANDARDS 2d] (noting indigent defense plans should be governed by independent boards of trustees to keep them free from political influence and excessive judicial supervision). But the recommendation has not been aggressively pushed. The U.S. Court of Appeals for the Fourth Circuit once refused to rehire Maryland Federal Defender Fred Bennett. Circuit Judge Paul Niemeyer reportedly argued that Bennett's aggressiveness might make him ineffective. A Baltimore assistant defender described the awkwardness of the situation: "We're representing [clients], but we're controlled by the court. When the head of our office is essentially terminated by the court [for being too aggressive], it's hard to explain." See Alison Frankel, *Too Independent*, AM. LAW., Jan./Feb. 1993, at 67, 67–70.

¹³ *Fuller v. Oregon*, 417 U.S. 40, 53 (1974).

¹⁴ Though indigents probably represent no more than 10–20 percent of the population, they account for 80 percent of those charged in felony cases. See Andy Court, *Is There a Crisis?*, AM. LAW., Jan./Feb. 1993, at 46. In retained-counsel cases, the claimed dominance of free enterprise

Placing the power to select counsel in the hands of the person whose interests the lawyer is tasked to represent would tap into those private-enterprise dynamics in a context where they are especially suitable and would obliterate at one stroke most of the conflicts of interest that presently infect the defense attorney's relationship with the indigent client. It would not automatically draw more resources into the system, but its dynamics would tend to have that effect.¹⁵ And at the very least, client choice would insure that if and when more funds do flow into the system, they will be devoted to higher quality service to clients rather than simply to more generous remuneration for lawyers that judges or court administrators (rather than clients) wish to reward.¹⁶

The refusal of American jurisdictions to allow client choice in indigent defense is difficult to understand in a society that pays almost boundless bipartisan homage to the virtues of the marketplace. Yet American courts (unlike their counterparts elsewhere in the common law world¹⁷) invariably dismiss as unthinkable any indigent defendant's claim to have a say in selecting his lawyer. Instead, they and the other official agencies responsible for organizing indigent defense in the United States simply take it for granted that state control over the selection of indigent defense counsel is as inevitable as indigency itself.¹⁸

principles is largely valid but somewhat exaggerated, because judges retain power to disqualify retained counsel on grounds of conflict of interest and to refuse to permit defendants to waive such conflicts. *See, e.g.,* *Wheat v. United States*, 486 U.S. 153 (1988).

¹⁵ *See text, infra* at note 95.

¹⁶ *See, e.g.,* LESTER, CASELOADS, *supra* note 4, at 204–05.

¹⁷ Indigent defendants have the right to select their attorney in England and Wales, in Scotland, and in Canada. *See, e.g.,* Earl Johnson Jr., *Equality Before the Law and the Social Contract*, 37 *FORDHAM URB. L.J.* 157, 189–90 (2010) (discussing England, Ontario, and Quebec); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 *HASTINGS L.J.* 835, 915–21 (2004) (Eng.) [hereinafter Lefstein, *Gideon's Promise*]; Tamara Goriely, *Evaluating Scottish Public Defense Solicitors Office*, 30 *BRIT. J. L. & SOC'Y* 84 (2003). With respect to Ontario, see also William W. Horne, *Canada's Cadillac*, *AM. LAW.*, Jan./Feb. 1993 62, 62–66 (discussing Ontario plan that allowed indigent defendants to choose from among 5,500 lawyers serving on legal aid panels). As of 2014, there were 5,007 private attorneys certified to serve on the legal aid panels. *Legal Aid Panel Membership*, LEGAL AID ONTARIO, (2014), http://legalaid.on.ca/en/about/fact_panelmemberships.asp.

¹⁸ Professor Lefstein, who has been actively involved in ABA indigent reform efforts for many years, reports that in the preparation of two major ABA publications on the subject (one in 1992 and another in 2002), “the issue of client selection of counsel was never discussed.” LESTER, CASELOADS, *supra* note 4, at 242 n.53. At one time, the Judicial Conference of the United States endorsed limited experimentation with a client-choice model, but apparently no such experiments have been tried prior to the Comal County initiative. *See, e.g.,* JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT, INTERIM REPORT (1992), reprinted in 51 *CRIM. L. REP.* 2335, 2337 (1992) [hereinafter 1992 INTERIM REPORT] (recommending “an experimental program . . . in volunteer pilot districts in which certain CJA-eligible defendants would get a limited choice of counsel”). *See also* ABA STANDARDS 2d, *supra* note 12, at § 5-2.3 (footnotes omitted):

Neither statutes nor court decisions recognize the right of an eligible defendant to select the private lawyer of his or her choice [Yet there] is much to be said for allowing the eligible defendant, when administratively feasible, the same freedom of action

Academic work challenging this instance of American exceptionalism has been sparse. An extensive literature and case law considers impediments to client choice for defendants with the means *to retain* counsel¹⁹ but largely accepts the absence of choice for the indigent as if it were a built-in regularity of the physical universe.²⁰

In previous articles, David Friedman and I challenged this paradigm.²¹ Friedman and I showed that cost-control, though a legitimate concern, cannot excuse the denial of client choice and that other arguments against choice are almost entirely bogus. A scattering of other commentators, notably including one of the nation's leading indigent defense experts, Norman Lefstein,²² also support client choice.²³ But the concept has nonetheless drawn virtually no interest from indigent defense lawyers and defense system administrators.

That situation recently changed, however, when the Texas Indigent Defense Commission (TIDC) decided to put the proposal into effect on a trial basis. Unlike indigent defendants anywhere else in the United States and for the first time in American history (so far as we know), indigent defendants in Comal County, Texas, will now be permitted to select the attorney who will represent them at state expense.²⁴ Although objections to client choice should, in principle, prove baseless, the effort to implement the concept in a real-world court system has

available to the defendant of means. . . . Obviously, if all defendants insisted on the right to choose their own attorneys, the administrative burden would surely undermine the effectiveness of the assigned-counsel system. But where the requests are few and do not pose serious administrative inconvenience, selection of counsel by defendants should be encouraged.

See also ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES § 5-2.3, comment. at 38 (3d ed. 1992) [hereinafter, ABA STANDARDS 3d] (stating flatly that “[n]either statutes nor court decisions recognize the right of an eligible [indigent] defendant to select the private lawyer of his or her choice” and raising no question about the propriety of this rule or its justification).

¹⁹ See, e.g., *Wheat v. United States*, 486 U.S. 153 (1988).

²⁰ See, e.g., *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (“[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.”).

²¹ STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM 1 (2010) [hereinafter SCHULHOFER & FRIEDMAN, REFORMING INDIGENT DEFENSE], available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa666.pdf>; Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993) [hereinafter Schulhofer & Friedman, *Rethinking Indigent Defense*].

²² See LEFSTEIN, CASELOADS, *supra* note 4, at 241–49.

²³ For other American academic commentary in support of client choice, see Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181 (1998); Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

²⁴ Technically, Comal County government does not entirely foot the bill. In Texas, as in most other jurisdictions throughout the United States, indigent defendants, if convicted, are obligated to reimburse the costs of their defense. See *infra* notes 66–70.

required attention to a host of details. Some of these objections are intricate but largely mechanical; others have called for unexpected choices between potentially conflicting foundational values.

In this article, I explain the theoretical underpinnings of client choice for the indigent and the objections conventionally raised against it. I then discuss the practical complexities entailed in putting the concept into action in Comal County and the prospects for success with the client-choice model, both in Comal and in court systems that differ from Comal in potentially significant ways.

Part I briefly outlines the different indigent defense systems deployed in the United States, focusing on the structural obstacles they create for the attorney's ability to render effective assistance. Inadequate funding, excessive caseloads and related problems are extensively discussed in the literature and scarcely require rehearsal here, but Part I examines these well-known difficulties from the perspective of the incentive structure in which attorneys operate. Personal pride and professional ethics require lawyers to zealously assist the indigent client, without stinting on services rendered in order to please the appointing authority or the paying clients whom private defense counsel may also simultaneously represent. But Part I shows that in *all* existing systems (Comal County excepted), the attorney's *material* incentives point in the opposite direction.

Stringent resource constraints obviously maximize the tension between these conflicting material and ethical objectives. Such constraints often make it impossible for even the most selfless lawyers to live up to the best aspirations of their conscience. But enhanced funding, important though it is, can at best only mitigate this tension. Even in the absence of resource limitations, ethics and economics pull indigent defense counsel in opposing directions; indeed, the more that defense counsel is generously compensated, the stronger will be the incentive to please the appointing authority from which this compensation flows.

The prevalent reality today is that indigent defense counsel on the whole are deeply frustrated by their inability to serve their clients more effectively. No one can question that in most jurisdictions, better funding would unambiguously improve the position of indigent defendants. It bears stressing that nothing in the present analysis casts doubt on the pernicious impact of stringent resource constraints or on the importance of ameliorating that scandal. This is one place where we really can accomplish a lot by simply throwing money at the problem. Nonetheless, better funding and more generous remuneration cannot by themselves dispel clients' mistrust of their court-assigned counsel or the phenomenon, all too frequent in many jurisdictions, of lawyers who sometimes lack idealism and simply see indigent defense practice as an attractive source of revenue for an otherwise slumping practice. Along with the all-important resource issue, structural flaws and distorted incentives must be addressed as well.

Part II identifies the principal objections to client choice, and explains why those objections are largely spurious. Part III begins by describing the Comal County setting, including the organization of its courts and the ways in which Comal differs from other American jurisdictions in which client choice could

profitably be tried. Part III then explains the issues that arise when local officials contemplate putting a client-choice option into operation in a specific court system, and how the Texas Indigent Defense Commission (TIDC) plans to assess its impact along a variety of dimensions. Finally, Part IV suggests prospects for extending the Comal experience to a wider spectrum of American jurisdictions.

I. THE PROBLEM OF STRUCTURAL INCENTIVES

Criminal defense attorneys, whether they represent indigent defendants or wealthy ones, must make difficult choices—including decisions about how much work to do (whether to investigate factual leads, research legal issues, or file particular legal motions in court) and about what advice to render in matters of judgment (whether to recommend accepting a proposed settlement, holding out for a better offer, or going to trial in hopes of an acquittal). For all of these decisions, the client must rely on and largely defer to the lawyer's advice; it is therefore essential that the lawyer's recommendations be disinterested. Yet, the lawyer's personal needs and goals often diverge from those of her client. If attorney compensation is low, defense counsel may forego useful investigations and may avoid trial even when there are good chances for acquittal.²⁵ On the other hand, if compensation is very generous, defense counsel may pursue unproductive investigations or hold out hopes for acquittal at trial when a guilty plea would better serve the client's interest.²⁶

As a result, the attorney-client relationship presents two opposing potentials for distortion: the lawyer may gain by devoting to the case more effort or less effort than the client's needs really require. These problems are present to a degree in both retained counsel and indigent defense cases but they become vastly more serious when the client is indigent.

For retained counsel, the risk of *insufficient* effort is diminished, as in any market transaction, by the seller's need to establish a reputation for good service. The converse problem—*excessive* effort—is mitigated because the non-indigent client ultimately must decide whether a potentially promising but expensive defense strategy (for example, choosing to contest the charges at trial) is worth pursuing. Non-indigent criminal defendants may be willing to spend a lot to achieve even a small increase in the chance of acquittal, especially if they face substantial prison terms, sex offender registration, deportation, or other highly afflictive consequences. But at some point, diminishing returns presumably prompt most non-indigent defendants to economize on the expenditure of their own or their family's resources, even when funds remain available. And even for

²⁵ See Schulhofer, *Discretion*, *supra* note 6.

²⁶ See Mark Hansen, *Indigent Defense Fee Abuses Found*, 78 A.B.A. J., at 29 (1992) (attributing abuses in Miami's court-appointed indigent defense system to the absence of incentives for lawyers to limit their fees).

quite affluent defendants, funds will not remain available indefinitely; money may run out before a potentially productive defense effort can be fully pursued.

A second dynamic moderates—in the case of retained counsel—the potential conflict between the lawyer’s interest in earning a substantial fee and the client’s interest in not spending money wastefully. In order to attract clients, the criminal defense attorney must establish and maintain a reputation for serving client interests even when those interests diverge from her own. Thus, the white collar defense attorney must be known for making prudent strategic choices, not running up higher hourly bills than necessary, and not demanding a fixed retainer higher than the case warrants. The white collar criminal defense attorney must have a reputation for working diligently even when the case turns out to require more effort than initially contemplated when a fixed retainer was set.

Indigency presents an immediate problem for managing both types of risks. First, the attorney may expend *unnecessary* effort because the client—who nominally directs the important strategic choices—no longer bears the cost of the attorney’s time. This is the elephant in the room that always bedevils consumer sovereignty in domains where—as in health care, for example—there is a break in the usual link between consumer control over what to buy and consumer responsibility to pay for it. As in any situation in which the cost of services sold is supported by a third-party who cannot easily monitor the justification for the buyer’s choices, expenditure is likely to skyrocket. Conversely, the attorney may expend *insufficient* effort because client satisfaction does not necessarily determine the flow of cases and fees to the attorney’s office. If the attorney wishes to obtain future cases, she must indeed maintain her reputation, but only with those who provide her with business, not with potential clients. In sum, the party that pays the cost of indigent defense (the state) bears the risk that the attorney will work harder than necessary and the defendant bears the risk that the attorney will not work hard enough.

This section examines the specifics of how these conflicts of interest play out and the ways in which they are managed in each of the three prevalent American indigent defense systems—the defender, appointed-counsel, and contract models.²⁷ The details differ, but when the analytic dust settles, the situation that emerges in each of the prevalent models is largely the same. None of these models escape the

²⁷ American jurisdictions sometimes use only one approach exclusively, but more often the basic approaches are combined in some fashion. In the assigned-counsel model, attorneys who maintain a private practice are appointed for indigent defendants on a case-by-case basis. In the public-defender model, an organization staffed by attorneys on salary represents most of the indigents in the jurisdiction. Even in jurisdictions where the public defender handles nearly all indigent defense cases, however, a small assigned counsel program typically must be available as a gap-filler for cases in which the public defender is disqualified—by conflict of interest, for example. In addition, some cities and counties use a “contract” system, in which individual attorneys or firms that are primarily devoted to a private practice agree to handle—for a fixed contractual fee—either a certain number of indigent cases or all indigent cases of a certain kind that are filed during the contract period.

foundational problem that the loyalty of the indigent defendant's attorney does not run primarily to the defendant whom the lawyer is ostensibly obligated to serve. All of the models largely solve the unnecessary-effort problem, because the state, which ultimately foots the bill, maintains direct or indirect control over the amount spent and the flow of future business to the attorney. But none of them affords the indigent defendant any comparable protection. None of the prevalent American systems provides a mechanism for managing the insufficient-effort problem because the party that bears the consequences of that deficiency (the client) has no say in the selection of the attorney or the attorney's prospects for attracting future indigent defense business.

A. The Assigned-Counsel Model.

In an assigned-counsel program, a member of the private bar is appointed on a case-by-case basis for each criminal defendant. Most American counties rely on assigned counsel as their primary source of indigent defense representation, and those which use a public defender or contract defender approach usually must turn to assigned counsel for representation when public and contract defenders are disqualified or unavailable.²⁸

The attorney to be appointed is usually designated by a court official or even by the judge assigned to the case. In some jurisdictions, appointments are simply made on an *ad hoc* basis to lawyers who happen to be in the courtroom. In the more common system, the indigent defendant's counsel is picked from a list established in advance by a court official or by the local bar association. Selection of attorneys from that list may be made *ad hoc*, at random, or in accordance with a formal rotation plan. All members of the bar may be eligible to serve, or inclusion on the list may require a certain number of years of prior criminal defense experience. Some jurisdictions using the assigned-counsel approach have more detailed eligibility requirements or a system to screen attorneys seeking to be included on the list.²⁹

Assigned attorneys have not necessarily applied for the list or volunteered to serve. Most courts have authority to require an unwilling attorney to serve when no other lawyer is available, and in some jurisdictions, unwilling attorneys are routinely conscripted and represent a significant proportion of all indigent criminal defendants.³⁰

²⁸ ROBERT L. SPANGENBERG & PATRICIA A. SMITH, AN INTRODUCTION TO INDIGENT DEFENSE SYSTEMS 15 (1986).

²⁹ *Id.* at 9.

³⁰ *Madden v. Township of Delran*, 601 A.2d 211 (N.J. 1992) (upholding the constitutionality of uncompensated, involuntary assignment of counsel to indigents). *See, e.g.,* *People v. Otano*, 548 N.Y.S.2d 401 (Just. Ct. 1989) (upholding conscription of unwilling member of the Legal Aid Society); *See also* David Margolick, *Volunteers or Not, Tennessee Lawyers Help Poor*, N.Y. TIMES (Jan. 17, 1992), <http://www.nytimes.com/1992/01/17/news/volunteers-or-not-tennessee-lawyers->

Assigned counsel programs use a number of different approaches for compensating assigned attorneys—typically, either a flat fee per case or an hourly rate, often with one rate for hours spent in court and a lower rate for out-of-court preparation. Hourly rates are typically quite low. A June 2007 survey found many jurisdictions still pay only \$40 or \$50 per hour,³¹ rates that are inadequate even to meet the attorney's office overhead.³²

When compensation is based on time devoted to the case, a judge or court administrator always reviews the attorney's bill, and they often reduce fee claims, sometimes in a way that assigned counsel considers unjustified. Typically, there is a cap on the total fee that can be paid for a case, and although the cap can be waived by a court official in some jurisdictions (such as the federal courts), in many others the fee cap is low and unwaivable. In such jurisdictions, compensation may in theory be based on the time devoted to the matter, but in practice, it simply becomes a flat fee per case.

Maximums are currently set at \$3,600 for the District of Columbia, \$3,000 for West Virginia, and \$2,500 in Florida and Nevada.³³ But as of June 2007, the maximum fee for a non-capital felony was only \$1,500 in Tennessee and Kentucky, \$1,250 in Illinois, \$650 in New Mexico, and only \$500 in one county of Oklahoma.³⁴ In Virginia, the maximum is \$445 for felonies carrying a sentence of up to 20 years, and for felonies punishable by sentences over 20 years, it is a mere \$1,235—enough to fund less than two days' work at the authorized rate of \$90 dollars per hour. Some jurisdictions regard indigent defense as a "pro bono" obligation, and appointed counsel can be conscripted to serve without any compensation at all.³⁵ Although the no-compensation approach is exceptional, flat

help-poor.html (conscripted without pay); *Tennessee Lawyers Balk at Defending the Poor for Free*, ATLANTA J.-CONST., Jan. 8, 1992, at 3 [hereinafter *Tennessee Lawyers Balk*] (same). Cf. *State v. Lynch*, 796 P.2d 1150, 1158 (Okla. 1990) (upholding system of conscripting defense attorneys in capital cases, but mandating "adequate, speedy, and certain compensation"). For an account of the problems faced by conscripted lawyers, see Audrey Duff, *Slaves of St. Louis*, AM. LAW., Jan./Feb. 1993, at 85.

³¹ REBECCA A. DESILETS, ROBERT L. SPANGENBERG & JENNIFER W. RIGGS, THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW (2007); see also *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992) (appointed attorney in Texas capital case was paid \$11.84 per hour). *Mooney v. Trombley*, 2007 U.S. Dist. LEXIS 15298, *30–33 (E.D. Mich. 2007) (flat rate of \$590 per case, which averaged less than \$6.00 an hour, was not prejudicial); Hourly rates for out-of-court time stand at \$65 for Connecticut, \$50 for Massachusetts and New Jersey, and \$40 for Oregon and Wisconsin. See SPANGENBERG GROUP, *supra*, at 2–10.

³² See, e.g., *Sheppard v. Jacksonville*, 827 So.2d 925, 931 (Fla. 2002) (\$40 an hour compensation rendered counsel unable to cover overhead); *State v. Young*, 172 P.3d 138, 140 (N.M. 2007) (overhead costs for a capital case was \$73.96 an hour); *New York County Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 416–17 (N.Y. Sup. Ct. 2003) (average overhead in N.Y. was \$42.88 an hour, with a range of \$26.80 to \$62.50 per hour).

³³ See SPANGENBERG GROUP, *supra* note 31, at 1–10.

³⁴ *Id.*

³⁵ See *State v. Rush*, 217 A.2d 441, 445 (N.J. 1966) (upholding the practice in many New Jersey municipalities of conscripting attorneys to serve without compensation), *reaffirmed by*

fees or fee caps are so low in many jurisdictions that hourly compensation in cases that go to trial is virtually nil.

Distorted incentives are pervasive in assigned counsel programs. When judges or court officials select counsel, they are often in a good position to acquire information about attorney competence, but they have few incentives to use their knowledge to pick the very best lawyer. Their own interests often can be served by selecting an attorney known for taking a “reasonable” approach rather than one who is aggressively adversarial.³⁶ Importantly, however, this difficulty is minimized in those few jurisdictions that permit the attorney-assignment mechanism to be under the control of the bar association or a public interest board not dominated by government officials.³⁷

With respect to the attorney himself, the problem is to induce sufficient but not excessive effort. A few jurisdictions compensate appointed counsel at levels that approximate prevailing market rates.³⁸ All indigent defense reform efforts, without exception, strive for this arrangement, and it is no doubt better than the alternative—i.e., *inadequate* compensation. But market-rate fees are by no means a panacea. When hourly fees are fully compensatory, attorneys may pursue expensive strategies and unproductive investigations, or they may hold out hopes for acquittal at trial when a guilty plea would better serve the client’s interest.³⁹ This is a problem for the client if he foots the bill, but it becomes a problem for the taxpayer when, as in the case of an indigent defendant, the government does.

Jurisdictions that afford generous compensation are a small minority, but the risks of unnecessary effort and expense arise even when fees are modest. In the absence of conscription, low rates mainly draw less seasoned or less effective lawyers, because rates below the market median can be quite attractive for attorneys who are inexperienced or not blessed with a flourishing practice. Lawyers in those situations have financial motives to bill more time than necessary. Indeed, those incentives can be powerful when the attorney’s practice is struggling. And of course that danger is exacerbated whenever compensation is

Bolyard v. Berman, 644 A.2d 1122, 1129 (N.J. 1994) (“[O]ur [state] Supreme Court has expressly held that a defendant’s right to counsel . . . may be satisfied by the appointment of uncompensated private counsel.”). *See also* *State v. Citizen*, 898 So.2d 325, 331 (La. 2005) (“uncompensated representation . . . is a professional obligation . . . of practicing law” but the court must grant “reasonable . . . overhead costs.”); *Office of the Public Defender v. State*, 993 A.2d 55, 75 (Md. 2010) (“[A] lawyer has no constitutional right to refuse an uncompensated appointment.”); David Margolick, *supra* note 30 (conscription without pay); *Tennessee Lawyers Balk* *supra* note 30. *Cf. Nichols v. Jackson*, 55 P.3d 1044, 1046–47 (Okla. 2002) (upholding the system of conscripting defense attorneys in capital cases, but mandating “adequate, speedy, and certain compensation”).

³⁶ *See supra* note 5, (discussing the ways that judges and other court officials select attorneys whom they perceive as cooperative rather than adversarial).

³⁷ *See, e.g.,* LEFSTEIN, CASELOADS, *supra* note 4, at 193–95, 217–19 (describing independence of indigent defense programs in Massachusetts and in San Mateo County, California).

³⁸ *Id.*

³⁹ Improper action in such situations need not be the result of conscious misfeasance. Strong financial rewards or penalties may subconsciously color the attorney’s judgment on debatable questions of trial tactics or negotiating strategy.

anywhere near market rates. Hourly fees close to market levels and an absence of fee caps give the right incentives for adequate service but they risk unnecessary attorney effort and run-away cost. In all of these scenarios, the incentive structure exposes the government to potentially excessive defense expenditures, without providing any mechanism (such as client choice) to steer liberal compensation to the attorneys most likely to deserve it.

In any event, the compensation arrangements in most assigned counsel systems present an entirely different set of incentive problems. With only isolated exceptions, hourly rates are low and are further constrained by tight caps on maximum remuneration. Accordingly, appointed counsel typically face strong incentives to resolve their cases quickly and to minimize the time and effort devoted to the case. When the fee is low, relative to the lawyer's other opportunities, appointed attorneys may forego useful investigations and may avoid trial even when there are good chances for acquittal. Yet, flat fees and fee caps are so low in many jurisdictions that hourly remuneration can quickly drop to the vanishing point for any client who does not rapidly agree to plead guilty. For cases that go to trial in these jurisdictions, and even for cases that require extensive pre-plea investigation, most of a defense lawyer's time must be offered free of charge; after the first few hours of representation, no compensation is available. Under such circumstances, assigned-counsel systems forcefully discourage thorough preparation, adequate consultation with the client, and willingness to fight the charges with persistence.

In an opinion upholding conscription of counsel to represent indigent defendants without any pay at all, the New Jersey Supreme Court stated that "a lawyer needs no motivation beyond his sense of duty and his pride."⁴⁰ Really? Though easy to disparage, this lofty and naïve sentiment should not be dismissed entirely; professional ethics and idealism no doubt motivate most indigent defense attorneys to do what they can to serve their clients well. Nonetheless, nonmaterial incentives cannot possibly cancel out the formidable financial pressures that can push in the other direction. A West Virginia court saw this point clearly:

We have a high opinion of the dedication, generosity, and selflessness of this State's lawyers. But . . . it is unrealistic to expect *all* appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work. It is counter-intuitive to expect that appointed counsel will be unaffected by the fact that after expending 50 hours on a case they are working for free. Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted.⁴¹

⁴⁰ State v. Rush, 217 A.2d 441, 444 (N.J. 1966).

⁴¹ Jewell v. Maynard, 383 S.E.2d 536, 544 (W.Va. 1989).

The relatively generous jurisdictions, facing the opposite problem of potentially *excessive* effort, rely on reputation effects, along with case-by-case review of attorney fee submissions, to prevent over-billing. Review of fee submissions has worked reasonably well in the federal courts, where hourly rates are among the nation's highest. But since court administrators can cope with the risk of high costs by assigning attorneys predisposed to be cooperative, or not reappointing those who seem too diligent, the defendant still needs—but largely lacks—some vehicle for effective monitoring of the adequacy of service, even when compensation tariffs are nominally generous.

Only when unstinting compensation is joined with an attorney-assignment mechanism insulated from government control (a combination realized at best only in the federal system and perhaps one or two states⁴²) can an indigent defendant be assured that counsel designated for him will be under no pressure to serve any interest other than exclusively his own.

B. Public Defender Systems.

The majority of the public defender organizations are agencies of state or county government, and most others are government agencies placed within the judicial branch. A few public defender organizations are private non-profit corporations, which contract with the government to provide indigent defense services.⁴³

Many defender offices, probably the majority, are small, employing only three or fewer full-time attorneys. But the public defenders in Los Angeles and in Cook County (Chicago) each employ more than 400 attorneys. Even the small defender offices usually employ investigators, and the larger offices tend to have substantial support staffs, including social workers and paralegals.

Though all public defender systems are funded directly or indirectly by the government, there are important differences in *the level* of government which supplies that financing. Resources are especially constrained when funding must come from local sources. Yet in twenty-eight states, county government bears nearly all the cost of the public defender. In two of these states, Michigan and Pennsylvania, local counties must cover the entire cost of indigent defense at the trial level.⁴⁴ At the opposite extreme, two state governments, those of

⁴² See *supra* note 37 (discussing Massachusetts and San Mateo County, California). See also LEFSTEIN, CASELOADS, *supra* note 4, at 205–15 (discussing Public Defender Service in Washington, D.C.).

⁴³ See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL DEFENSE SYSTEMS: A NATIONAL SURVEY 3 (1984) [hereinafter CRIMINAL DEFENSE SYSTEMS].

⁴⁴ Andrew W. Goldsmith, *The Bill for Rights: State and Local Financing of Public Education and Indigent Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 89, 92 (2005); *Id.*, at 107–08 (noting that “[i]ndigent defense at the trial level in Michigan is fully financed by counties,” and that county government also pays for indigent defense counsel in most appeals, but that state government

Massachusetts and Maryland, fully fund indigent defense at both the trial and appellate levels.⁴⁵

There are also significant differences in the government's formal control over the defender system. Where local counties are largely responsible for financing the indigent defense system, as in most states, county officials typically appoint the Chief Defender. But in some places, she is appointed by a bar association committee, by judges (especially when the defender office is an agency of the judicial branch), or by the board of the non-profit corporation. In a few jurisdictions, the Chief Public Defender is elected,⁴⁶ an arrangement that affords independence from county government and the court but makes the Defender beholden to voters who may or may not value aggressive efforts to secure the acquittal or early release of those who are accused of crimes.

Despite these threats to the Chief Defender's independence, the great majority of public defenders are idealistic and dedicated to affording indigent defendants the best defense that they can provide under constrained circumstances. Even so, if the head of the public defender office wants to keep her job, she must balance her preference for vigorous advocacy with the need to work within the available resources while also accommodating the case-management priorities of the court. And as a result, the great majority of defender systems are underfunded, taxed with grossly excessive caseloads, and unable to provide their clients with even minimally adequate services.⁴⁷ Within the limits of her budget, the Chief Defender can hire extremely dedicated attorneys, and she will have a good sense of their individual strengths and limitations. She is well placed to pick the best possible defense attorney for the case, at least if she wants to pick the one who is the most zealous and effective. But if the Chief Defender rates her staff on the basis of their ability to settle cases quickly without trial, a defendant might get a more dedicated advocate by making the selection himself, even if his information about attorney capabilities is highly imperfect.

From a social perspective, there is a need to assure that public defenders have appropriate but directly conflicting incentives—to deliver zealous service to their clients but to respect the taxpayer's justified need to assure that the costs of this service do not spiral out of control. The defender system solves the cost-control problem quite effectively because the government sets the defender office's budget and may even appoint the Chief Defender (directly or indirectly). Once the Defender's budget is set, she will have no choice but to insure that her staff scrupulously rations its time, so that her office provides the best possible service to its indigent defendant clients as a whole.

The defender model does little, however, to address the other incentive

supports the compensation of indigent defense counsel on appeal in approximately 25% of cases); Rudovsky, *supra* note 4, at 394 (Pennsylvania).

⁴⁵ Goldsmith, *supra* note 44, at 129 (Maryland); LEFSTEIN, CASELOADS, *supra* note 4, at 193–205 (Massachusetts).

⁴⁶ See SPANGENBERG & SMITH, *supra* note 28, at 17.

⁴⁷ See LEFSTEIN, CASELOADS, *supra* note 4, at 12–19.

problem—that of inducing the office’s staff to meet each client’s need for a zealous defense. In terms of purely material self-interest, the Chief Defender and her individual staff attorneys may have little reason to do *anything* for their clients, beyond the minimal effort required to avoid professional discipline or suit for ineffective assistance. But of course personal pride and a commitment to professional values provide powerful non-material incentives. Most defender offices foster a strong *esprit de corps* and are staffed by idealistic lawyers who want to give their best to serve the disadvantaged clients who are dependent on their help.

The defender model therefore provides a distinctive way to reconcile the twin dangers of inadequate effort and, conversely, excessive cost. When government controls compensation case-by-case, as in the assigned counsel systems considered below, some form of micro-level monitoring is essential to prevent excessive and unjustified bills for service. In the defender approach, in contrast, the state exercises its cost-control function wholesale, leaving “retail” decisions to the Chief Defender and other supervisors in her office. Their annual budget permits them (like prosecutors) to invest enormous resources in a particular case if their sense of justice requires, free of the chilling effect of case-by-case external review. But even so, the cost-control imperative must inevitably constrain the management of most cases. The need to keep an eye on the annual bottom line may even create a more powerful and pervasive cost-control ethos than would exist for a private attorney who had to justify a single claim for fees in an individual case.

For the individual staff attorney in a public defender system, narrower self-interest may reinforce idealism in providing an incentive for zealous effort. To be well-regarded by judges and by other attorneys, and to open the door to subsequent career moves, the staff attorney must have a reputation for vigorous advocacy.⁴⁸ Although the necessary skills and commitments can be vividly on display at trial, they are unlikely to be noticed, one way or the other, if the staff attorney makes a low-visibility recommendation that her client accept a plea offer.⁴⁹ Self-regarding reputation effects may even have a *negative* impact on the attorney’s representation by inducing her to recommend trial in a case that would attract publicity or showcase her talent; relatedly, reputation effects can also impair representation when they induce the staff attorney to plead out some defendants in order to permit better preparation in high-visibility cases.

In any event, self-interested reasons for effective performance, even when reinforced by idealism and office *esprit de corps*, must compete with office attitudes that run in the opposite direction—those of restraining costs and cooperating in the court’s desire to turn cases over quickly. Because staff

⁴⁸ See Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1099–1100 (1984) (discussing the need for lawyers to develop a reputation for assertive advocacy in order to achieve success within the public defender’s office and then move into private practice).

⁴⁹ See Schulhofer, *Discretion*, *supra* note 6, at 53–60.

attorneys are typically paid an annual salary, they do not lose money by giving in-depth attention to a particular case. But public defender offices are typically obliged to accept most cases prosecuted in the jurisdiction, and each defender on staff accordingly becomes responsible for a large caseload, often far in excess of what ethical norms regard as professionally acceptable. Recommended caseloads for public defenders range from 100 to 200 noncapital felonies per year; yet in Florida's Miami-Dade County, some assistant public defenders carried more than 700 felony cases per year.⁵⁰ Even with caseloads at half of this level, attorneys in effect have one new felony case every day of the year, Saturdays and Sundays included; they can hardly be expected to find sufficient time to investigate the facts, interview the client and witnesses, file appropriate motions, obtain discovery, and scrutinize whatever portion of the prosecutor's evidence may be available in theory to the defense. Thus, the staff attorney who adopts an especially adversarial stance and devotes especially vigorous effort to her cases may win only the disapproval of her boss and colleagues.⁵¹

The public defender model therefore presents a highly flawed solution to the problem of providing sufficient incentives for zealous client service. When high crime rates, crowded dockets, and a growing caseload preoccupy a court system, or even create a perception of perpetual "crisis," judges and other officials who indirectly govern the indigent defense system may decide that a Chief Defender who instructs staff lawyers not to quickly plead out their clients, to seek acquittals at trial whenever possible, or to seek the lowest possible sentences is not the person whom they prefer to place in charge of defending indigent clients.

C. The "Contract" System

In a contract defense program, individual attorneys or private law firms agree to handle indigent defense cases for a specified fee. Although an attorney under contract could choose to do indigent defense work exclusively, contract defenders typically maintain a substantial private practice. A contract defender normally handles only a part of the jurisdiction's indigent defense caseload; counties that use this approach therefore may have several private attorneys or firms under contract.⁵² Only about 10% of all American counties use the "contract" system as their primary means for delivering indigent defense services. Many other counties use the contract method as a back-up system for cases that their public defender

⁵⁰ See KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE 91-94 (2013).

⁵¹ See, e.g., *Reports and Proposals*, 51 CRIM. L. REP. 1285 (1992) (This reports on an instance in which the Fulton County Public Defender demoted a staff attorney because she had asked the court to appoint her to no more than six cases per day. At the time, she had been assigned to handle 45 cases at a single arraignment session, leaving her only 10 minutes for each felony client.).

⁵² See Lawrence D. Spears, *Contract Counsel: A Different Way to Defend the Poor*, 6 CRIM. JUST. 24, 25-26 (1991).

cannot accept.⁵³

The contract system has advantages for small jurisdictions with low case volume, and it is therefore widely used in some sparsely populated states, such as North Dakota.⁵⁴ Cost per case is often lower than when counsel is designated by individual assignments and contract counsel have more opportunity than individually assigned counsel to specialize in a particular kind of criminal practice. Although in theory counties could choose to award contracts to the lowest bidder, without regard to the expected quality of service, this danger apparently has not materialized, at least not in any flagrant way. Competitive bidding is widely used, but the cost is usually stipulated in advance; surveys indicate that bidders are usually selected on the basis of the anticipated quality of services offered—difficult as that is to measure in advance.⁵⁵

Two types of contracts are common. In the global-fee approach, the contract defender agrees, in return for a fixed annual retainer, to accept all cases of a certain type—for example, all felonies or all juvenile cases. County officials tend to prefer this fixed-retainer approach because it makes the indigent defense budget predictable and puts a cap on total expenses. But this system leaves the contract attorney with the risk of unforeseen increases in the court's caseload, which can result from trends in crime, from unexpectedly complex, high-visibility cases, or from changes in the District Attorney's charging policies. That risk for the lawyer (the risk of being obliged to provide service essentially free of charge) in turn translates into a risk for the contract attorney's clients—the risk of being represented by an uncompensated and potentially unhappy, uncommitted advocate. Yet, about a third of all contract programs compensate defense counsel through a global fee arrangement.⁵⁶

The other common model is the individual-fee contract, in which the attorney or firm commits to handling cases for a flat fee per case. The majority of contract defender agreements are framed in this way. These contracts protect the attorney from the risk of unforeseen increases in case volume, but they still create large distortions in the attorney's incentives, because compensation per case is independent of the effort that the case requires.⁵⁷

⁵³ Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32 (1995).

⁵⁴ Spears, *supra* note 52, at 25.

⁵⁵ See SPANGENBERG & SMITH, *supra* note 28, at 13–14. Note, however, that since competition between contract attorneys occurs only over quality of service, not price, outside observers cannot easily determine whether the winning bid is really the one that promises to deliver the most vigorous representation for clients. Critics also charge that contract arrangements sometimes induce attorneys to minimize the time they spend on cases and the resources they devote to investigators and experts. See, e.g., RICHARD J. WILSON, NAT'L LEGAL AID & DEFENDER ASS'N, CONTRACT-BID PROGRAM: A THREAT TO QUALITY INDIGENT DEFENSE SERVICES 20 (1982).

⁵⁶ SPANGENBERG & SMITH, *supra* note 28, at 13.

⁵⁷ Contracts sometimes permit the award of supplemental payments to the attorney in some circumstances. *Id.*

To be sure, a “profit-maximizing” contract attorney might decide to give each case all the time it needs, reasoning that insufficient fees in some cases will be offset by unexpectedly generous “profit” in fixed-fee cases that are disposed of quickly. But two alternative scenarios are less sanguine.

First, even though generous fees in simple cases will afford the attorney a cushion that *permits* her to devote extra time to complex cases, there is no material incentive for the lawyer to do so. She will still be influenced, consciously or unconsciously, by *competing* impulses: professional zeal will motivate efforts to provide thorough representation, but the fixed fee applicable to each case may set expectations in the opposite direction if it is seen as reflecting legitimate assumptions about how much time each case is “worth.” Second, and even worse, if the fixed fee already presupposes quick disposition and is set no higher than necessary to assure fair compensation in such cases, the incentive structure strongly discourages pursuit of any time-consuming defense strategy, which would necessarily represent an uncompensated drain on the attorney’s time.

These incentive problems arising in the contract defense system largely mirror those in the public defender approach, but with several key differences. When the contract price is fixed in advance and is not an object of competitive bidding, the county’s expenses for indigent defense are not affected by the zealousness of the attorneys selected. As in a public defender model, the county, for whatever it chooses to spend, can select the best available defense attorneys. But the contract approach is subject to the same crucial qualification that applies to public defender systems even when payments to defense attorneys are fixed: zealous representation, if it leads to more motions, more trials or longer trials, can quickly increase other costs that must be borne by the court. Thus, officials might hesitate to choose attorneys known for filing many motions, driving hard bargains, or insisting on trials, even if idealism and professional ethics were motivating these attorneys to make this effort at no extra charge.

The contract approach, again like the public defender model, addresses only one side of the incentive problem. Because fees are fixed, either per case or per annum, attorneys have strong material incentives to avoid *unnecessary* service, but they have few self-regarding incentives for *adequate* service. Indeed, global fee and individual fee arrangements give the contract attorney a powerful *disincentive* to spend time on her indigent cases. In this respect, the contract system poses a much larger problem for indigent clients than the public defender model does.

Public defenders may have few economic incentives for providing zealous representation, but apart from any desire for leisure time, they have no concrete *disincentive* to work on their cases. Public defenders may cut costs on some cases to free up resources for others, but they cannot take home unspent cash at the end of the year. The contract defender, in contrast, is in business for a profit. Money saved on defending one case need not be spent on another; it may simply enhance the financial bottom line. Perhaps worse, the attorney has a concrete incentive to minimize the time spent on indigent cases, in order to free up time for handling more lucrative business. Worst of all, an attorney too busy to take on more work

can nonetheless avoid the need to turn away a paying client; instead she can simply cut some corners in her indigent case assignments. These problems are inherent in the contract model, and they have produced grave inadequacy in many contract defense programs.⁵⁸

The principal incentives for zealous advocacy in public defender programs—idealism and professional pride—of course operate as well for the contract attorney. But they may operate much less strongly for many of the latter, especially if they see their indigent defense contract primarily as a way of bringing revenue into their law practice.

Another factor that may encourage adequate service for clients is the contract attorney's annual opportunity to renegotiate the contracts. Counties must offer retainers at compensatory levels if they hope to induce private attorneys to bid for contracts and participate in the system. If contract prices are too low, private attorneys can simply walk away from this source of business. By comparison, a public defender office has little leverage in seeking to resist funding cuts and increases in its caseload-to-staff ratio.⁵⁹

A final incentive for the contract attorney to provide excellent representation would be her desire to secure renewal of the contract. But contract renewal requires satisfying the county, not the client, and the county's goals are, of course, ambivalent. By keeping costs, and hence next year's fees lower than those of potential rivals, the contract attorney may earn more per case and over the long run may obtain more indigent defense business. Cost-cutting is not undesirable per se, but it is problematic in indigent defense programs because the client who suffers from reductions in the quality of service has no control over the flow of business to the attorney who benefits from the decision to cut costs.

Though the contract system, in comparison to the public defender model, can potentially afford defense counsel a better framework for negotiating adequate levels of funding and compensation, in most respects its incentive effects are likely to produce distortions. The existence of competition between rival firms in the contract system should be advantageous, but the potential benefits of this rivalry are lost because court officials, rather than clients, control the flow of cases to the attorneys.

⁵⁸ See ABA STANDARDS 3d, *supra* note 18, at § 5-3.1 (discussing “uniformly dismal” results in early contract programs).

⁵⁹ See Spears, *supra* note 52, at 27–28 (describing how attorneys in contract programs adjust to increases in case load volumes). A public defender could have powerful leverage if its staff went on strike, but defender strikes have legally and politically proved problematic. See Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 688–90 (1987) (describing how 1982 strike of staff attorneys at New York Legal Aid Society generated political resentment and led the city to insist on including a no-strike clause in subsequent collective bargaining agreements).

II. ARGUMENTS AGAINST CLIENT CHOICE

As Part I has shown, incentives to stint on zealous representation and the potential for client mistrust of his lawyer are inherent in every American system currently in place for providing counsel to the indigent. By permitting the indigent defendant to select his own lawyer, American jurisdictions could instantly eliminate most if not all of the conflicts of interest that now distort the attorney-client relationship for the indigent defendant. Despite the simplicity of the concept, American courts and many commentators—including many who are committed to indigent defense reform—refuse to endorse the indigent defendant's claim to have a say in selecting the lawyer charged with protecting his interests.

The argument against client choice has several distinct strands—that denial of choice is constitutionally permissible, that systemic imperatives make choice unmanageable, and that client choice would ultimately disadvantage indigent defendants themselves. A final argument against choice approaches the problem from an entirely different direction. Its concern is that even if choice is not objectionable, it won't really offer any *affirmative help*. This final argument insists that resource levels are crucial, that without an infusion of more resources, no other reform can yield significant improvements, and therefore that work to institute a client-choice system will be at best irrelevant and at worst a distraction from efforts that can bear meaningful fruit. This section examines these four issues in turn and shows why all of them, on close examination, strongly support, rather than undermine, the importance of honoring an indigent defendant's claim to select his own counsel.

A. Constitutional Concerns

Courts have uniformly rejected indigent defendants' claims of a constitutional right to select their counsel.⁶⁰ Typically, that position is simply put forward as a truism. Thus, in *United States v. Gonzalez-Lopez*,⁶¹ a case involving alleged interference with a non-indigent defendant's ability to retain counsel of his own choosing, the Supreme Court, sensing no need for elaboration, stated baldly, without explanation or citation, that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them."⁶²

When courts have chosen to explain that conclusion, the essence of the argument against client choice typically has been just that the Sixth Amendment is

⁶⁰ *E.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *United States v. Ely*, 719 F.2d 902 (7th Cir. 1983); *Drumgo v. Superior Court*, 506 P.2d 1007 (Cal. 1973); *State v. Jimenez*, 815 A.2d 976, 980 (N.J. 2003); *Hickey v. State*, 576 S.E.2d 628, 630 (Ga. Ct. App. 2003) ("An indigent defendant is entitled to reasonably effective assistance of counsel, not to counsel of his own choosing.").

⁶¹ 548 U.S. 140 (2006).

⁶² *Id.* at 151.

satisfied by appointment of a competent lawyer, period—even if the defendant’s preferred lawyer would be better.⁶³ Thus, in *United States v. Ely*,⁶⁴ Judge Posner summarized the Sixth Amendment right in the following terms:

[T]he government’s constitutional obligation is exhausted “when the court appoints competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense.” . . . Ely does not argue that [appointed counsel] was incompetent or had a conflict of interest. . . . It was not that [appointed counsel] was not good but that [another attorney] was, in Ely’s opinion, better.⁶⁵

Interestingly, Judge Posner acknowledged that conflicts of interest are constitutionally unacceptable. But he treated conflicts as objectionable only when they involve a *commitment* contrary to the client’s interests. Economic *incentives* to maximize personal income or welfare, so central to Judge Posner’s academic work, were deemed insufficient to pose a constitutional problem.

We might speculate that the readiness to overlook this conflict (the conflict that arises from the indigent defense attorney’s incentive to satisfy the party paying his fee) is grounded in the assumption that the lawyer’s divided loyalty is inevitable: If indigent defense attorneys are to be paid at all, their fees ultimately must be paid by someone other than the client himself. But this is simply incorrect. Divided loyalty results not from the ultimate source of the funds the lawyer receives but from the identity of the party who controls the flow of those funds.

A doctor’s loyalty runs to the Medicare patient who places her health in the doctor’s care, not to the U. S. Department of Health and Human Services. A private school’s loyalty runs to the parents who use a voucher to cover their child’s tuition, not to the state government that supports the voucher. In just the same way, the part of a lawyer’s loyalty that is grounded in material incentives will run to the judge, court official, or bar association committee that brings income into her practice, not to the government from which the relevant official or bar committee draws those funds.

An undercurrent in much of the case law and literature dismissive of client control is, at bottom, some version of the aphorism that “beggars can’t be choosers.”⁶⁶ Obviously, an aphorism is not an argument, much less a

⁶³ 506 P.2d at 1010.

⁶⁴ 719 F.2d 902.

⁶⁵ *Id.* at 904 (quoting *Davis v. United States*, 604 F.2d 474, 479 (7th Cir. 1979)).

⁶⁶ See, e.g., Andrew Cohen, *What Does the Supreme Court Really Think About the Right to Counsel?*, THE ATLANTIC (Feb. 27, 2014, 2:49 PM), <http://www.theatlantic.com/national/archive/2014/02/what-does-the-supreme-court-really-think-about-the-right-to-counsel/284085/2/>. After noting that the Supreme Court has refused to extend the right to counsel of choice to

constitutional argument. But apart from that point, the aphorism simply does not apply, because the indigent defendant is no “beggar” pleading for a charitable handout. The defendant has a constitutional *right* to the effective assistance of counsel; the state pays that bill not as an act of grace but as a matter of obligation.

A related form of argument by aphorism is the notion that “he who pays the piper calls the tune.” Of course, this is precisely the problem. When it “pays the piper,” the state has inevitable opportunities to influence the tune that the defendant’s lawyer will choose to play—whether it will be a battle hymn or a refrain of harmonious cooperation. Yet no one would suggest that by paying the piper, the state becomes *entitled* to direct the attorney’s trial strategy. The possibility that such influence may operate is a danger the state is constitutionally obliged to allay, not one that can conceivably *justify* the denial of choice.

Moreover, the picture of the indigent defendant as petitioning for charitable aid is doubly inapt—and indeed false—because the state ultimately *does not* foot the bill; if convicted, the indigent defendant is *obligated to pay back* the cost of his defense.⁶⁷ *Fuller v. Oregon* leveraged the American ideology of “private enterprise” as a reason to see the indigent defendant as a mere borrower in a conventional market transaction.⁶⁸ Having a poor credit rating, indigent defendants cannot obtain a loan from a bank or finance company, so the government steps in as their lender of last resort. And in a market economy, *Fuller* reasons, it follows as a matter of course that the lender is entitled to demand that these borrowers repay their loans when and if they are able.⁶⁹

To be sure, indigent defendants in practice are seldom able to make more than token reimbursement.⁷⁰ Nonetheless, for those convicted but not incarcerated, the obligation to repay can cloud all their prospects for compliance with the terms of

indigent defendants, Cohen observes that “[t]his makes sense, of course, on a practical level. Beggars can’t be choosers even under a constitutional regime.” *Id.*

⁶⁷ See Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 323 (2009) (noting that, since *Fuller v. Oregon*, 417 U.S. 40 (1974), statutes requiring recoupment or defendant contribution to cost of counsel have become widespread); Kate Levine, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts’s Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191 (2007) (discussing Massachusetts’s statute that requires indigent defendants to pay a \$150 fee for court-appointed counsel); Lola Velázquez-Aguilú, *Not Poor Enough: Why Wisconsin’s System for Providing Indigent Defense Is Failing*, 2006 WIS. L. REV. 193, 210–17 (2006) (discussing Wisconsin’s reimbursement requirements).

⁶⁸ *Fuller v. Oregon*, 417 U.S. at 53.

⁶⁹ *Id.* at 53–54 (“A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.”).

⁷⁰ See Anderson, *supra* note 67, at 332 (discussing problems in administration of fee-recoupment regimes).

their probation and for reintegration into law-abiding society.⁷¹ Regardless of whether these debts are fully repaid, the convicted defendant (in most states) remains legally responsible for the cost of his defense. *Fuller*—and the persistent efforts of many states and counties to squeeze blood from this stone—therefore flips on their heads all the moral intuitions that cast the indigent defendant as a supplicant. Denying the party who legally bears the cost of indigent defense any moral entitlement to designate the service provider whom he himself is ultimately responsible to compensate, makes about as much sense as telling the would-be buyer of a car that if he wants an auto loan, the bank is justly entitled to pick the vehicle he will get to buy and ultimately pay for.

Obviously, the Sixth Amendment cannot guarantee to every defendant the very best lawyer in town. But this is true primarily for logistical reasons. The best possible lawyer will frequently be too expensive or too busy to serve. On its face, there is no reason why courts should consider the Sixth Amendment requirement to be satisfied by appointment of any competent attorney when a lawyer the defendant prefers is willing to serve at no additional cost.⁷² And even if a client-choice system is not constitutionally required, why should the denial of client choice be considered a *desirable* feature of a sound system of criminal justice?

At the end of the day, therefore, if the denial of client choice is to be deemed constitutionally permissible, that result must rest not on ethics or metaphysics but on systemic considerations that make client choice impracticable. In this sense, doctrinal analysis of the Sixth Amendment issue largely merges with the assessment of sensible policy. On both questions, the decisive issue is simply whether there is any good reason (any “rational basis”) to deny the defendant an option that he himself prefers.

B. Systemic Arguments Against Client Choice

With apparent unanimity, the judicial decisions not only reject *constitutional* arguments for choice but also refuse to permit client choice even when defendants seek that privilege merely as a matter of the court’s discretion. This uniformity of judicial opposition to choice suggests that some strong systemic imperative must be implicated. Yet that systemic concern is by no means easy to identify.

To be sure, judges and court administrators benefit in self-evident ways from their ability to control the counsel-assignment system. As already discussed, the no-choice regime allows courts, directly or indirectly, to steer appointments to political supporters or to steer them away from attorneys who are perceived to

⁷¹ See ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.

⁷² See Tague, *supra* note 23, at 99 (“The importance to the indigent of choosing his attorney is clear: improvement in the attorney-client relationship, representation by an able attorney who will fight aggressively for him, and the likelihood of greater participation in structuring his defense.”).

submit inflated bills or to make excessive demands on court time. The steering factor is the most obvious advantage of judicial control but also its biggest vice, because a judge's notion of excessive effort may simply be what a defendant regards as zealous representation. Courts must monitor attorney fee submissions in any event, and an attorney's willingness to defend a case in a vigorously adversarial manner cannot possibly be considered a *legitimate* reason for disqualification. Indeed, defenders of the no-choice regime have never sought to justify the system on that basis.

The openly articulated reasons against client choice, however, are exceptionally strained. Beyond cost control, two systemic difficulties have been raised, involving logistics and the need to assure fairness among attorneys.

1. Logistical Concerns

*United States v. Davis*⁷³ is one of the many cases assuming that client choice would place unmanageable strains on the management of the criminal docket. The court worried that more experienced lawyers would be in heavy demand, especially by repeat offenders, and therefore would inevitably be unavailable to many defendants who wanted their services. The result would be either a need for frequent continuances to accommodate the calendars of these overtaxed attorneys or unfairness to defendants who had to be denied the attorney they preferred. For that reason, among others, the *Davis* court concluded that refusal to honor a defendant's choice was "a *necessary* element of any system to rationally allocate assignments."⁷⁴

In *Ely*,⁷⁵ the Seventh Circuit echoed this fear of systemic chaos. *Ely* involved an indigent federal defendant who requested the appointment of a competent and willing local attorney. Upholding the district judge's refusal to honor the request, Judge Posner reasoned:

The best criminal lawyers . . . limit the amount of time they are willing to devote to this relatively unremunerative [indigent defense] work The services of the criminal defense bar cannot be auctioned to the highest bidder among the indigent accused—by definition, indigents are not bidders. But these services must be allocated somehow; *indigent defendants cannot be allowed to paralyze the system* by all flocking to one lawyer. The district judge in this case could not, realistically, be required to arbitrate a dispute between *Ely* and another indigent criminal defendant who wanted to be represented by [the same lawyer].⁷⁶

⁷³ 604 F.2d 474 (7th Cir. 1979).

⁷⁴ *Id.* at 479 (emphasis added).

⁷⁵ *United States v. Ely*, 719 F.2d 902 (7th Cir. 1983).

⁷⁶ *Id.* at 905 (emphasis added).

This “systemic paralysis” argument is difficult to understand. In *Ely* itself, the lawyer Ely wanted was ready and willing to serve. No other indigent defendant was making incompatible demands on the lawyer’s time. And even if that imagined dilemma had been present, it has no bearing on the feasibility of a client-choice option. At worst, the difficulty presented when indigent defendants “all flock to one lawyer” is not systemic paralysis but only the inconvenience for an attorney of having to say “no” to a potential client.

Can that inconvenience possibly be sufficient to justify the refusal to let the indigent client have a say in selecting his own lawyer? If it is, then non-indigent criminal defendants should have no right to choose their lawyers either, because they too might “all flock to one lawyer.” Busy attorneys have to turn away new business all the time. If this is a problem, it is one that most lawyers would love to have. And since counsel who offer to serve the indigent can always refuse additional appointments, no attorney must ever (or ethically can) carry a larger caseload than she herself considers manageable. If there is any logistical problem of this sort at all, court officials can avoid it simply by giving indigent defendants the names of the lawyers who are currently accepting indigent cases.

Although the logistical objections to client choice seem hyperbolic at best, the universal unwillingness of American jurisdictions even to experiment with this approach might suggest that logistical impediments cannot really be so trivial. Yet courts, government, and the bar all have self-interested motives to oppose client choice in some circumstances, and as a result the mere fact of their opposition cannot serve as decisive evidence against its feasibility. Indigents have long been permitted to select their own counsel in Ontario, Scotland, England and Wales,⁷⁷ so it seems *prima facie* implausible to assume, without ever trying it, that a client-choice option cannot work here.⁷⁸

2. Unfairness Among Attorneys

Several courts have objected that a client-choice system would produce unequal treatment or other unfairness between and among attorneys. Thus, in *Davis*, the Seventh Circuit expressed concern that freedom of choice for indigent defendants would “disrupt[] . . . the even-handed distribution of assignments.”⁷⁹ But why is even-handed distribution a value to be sought? Two possibilities suggest themselves.

⁷⁷ See *supra* note 17 and *infra* note 83.

⁷⁸ For ABA and Judicial Conference recommendations for limited experimentation with a client-choice system, see 1992 INTERIM REPORT, *supra* note 18; ABA STANDARDS 3d, *supra* note 18; and LEFSTEIN, CASELOADS, *supra* note 18.

⁷⁹ *Davis v. United States*, 604 F.2d 474, 478 (7th Cir. 1979) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, § 2.3, cmt. b (Approved Draft 1968)).

On one view, appointment may be seen as a prize that particular attorneys should not be permitted to hoard. This assumption seems counter-intuitive in a world where remuneration is so often minimal or derisory. Yet it is quite true that court-appointed indigent defense representation can generate handsome compensation in some circumstances. One is the situation in which a competent attorney with a successful private practice can turn over indigent cases rapidly with a quick plea after minimal factual investigation. The other is the situation in which the appointed attorney has an unsuccessful private practice and finds the income from indigent defense appointments very attractive compared to alternative opportunities. In either situation the appointment could represent a lucrative reward that the state should confer in an equitable manner.

Even under those circumstances, however, unfair allocation is far more likely when court officials dole out the prize than when indigent defendants choose to confer the benefit upon the attorney who, they believe, will offer them the best representation. Indeed, defendant choice would pressure lawyers to compete away the excess profits they would otherwise earn by offering better representation to potential clients.

The alternative (and diametrically opposed) reason to value “even-handed distribution” is that indigent defense assignments typically are not a prize but an ethical obligation or an annoyance, precisely because attorneys for the indigent usually *are not* well compensated.⁸⁰ If attorneys who view indigent defense appointments in this light began to attract a disproportionate share of indigent defense assignments (because indigent defendants were selecting them with disproportionate frequency), their appointments could indeed become an undue “imposition.”⁸¹ In a client-choice system run in that manner, good attorneys willing to serve could quickly be forced to bear an unfair share of society’s obligation to provide defense services to the indigent.

Yet this “undue imposition” concern, however plausible on its face, is completely bogus. Conscripting an unwilling attorney to represent a criminal defendant who wants the lawyer’s services (as the “undue imposition” argument assumes) makes no more sense than the evil that client choice is intended to allay—that of conscripting an unwilling defendant to accept the services of a lawyer who does want to represent him. The goal of any client-choice system is to assure that the attorney-client relationship is voluntarily chosen by both parties. Since any plausible indigent defense system must permit busy attorneys to refuse unwanted appointments, no lawyer need ever carry more cases than she herself considered fair.

⁸⁰ See, e.g., Ely, 719 F.2d at 905 (“[S]ome criminal lawyers, indeed, only reluctantly agree to serve as appointed counsel, under pressure by district judges to whom they feel a sense of professional obligation.”).

⁸¹ Davis, 604 F.2d at 479.

C. Can Freedom of Choice Harm Indigent Defendants?

Among opponents of client choice, three prominent reasons are offered to worry that the free-choice approach could ultimately leave indigent defendants worse off. It is said, first, that client choice could help some defendants (perhaps the least deserving among them) much more than others. Second, client choice could even result in poor representation more generally because (it is said) indigent criminal defendants are not likely to assess attorney quality as well as court administrators, bar association committees, or other well-informed officials who see criminal defense attorneys repeatedly and have a solid basis for assessing their performance. Finally, it is said, client choice could undermine the idealism that currently motivates many indigent defense lawyers to make herculean efforts on behalf of their clients, even in the face of grossly inadequate compensation and other resource support.

1. Unfairness Between Defendants

Some courts that reject client choice have based their opposition on the concern that granting a choice to defendants in an appointed counsel program would be inequitable because defendants assigned to the public defender cannot decide which lawyer will represent them. But this argument largely begs the client-choice question by taking as given the prevalent practice of denying defendants their choice of counsel from among the staff of a public defender office. The client-choice concept puts this practice itself in doubt. That said, the issue whether to afford client choice among public defender staff can be resolved in a variety of ways without impugning the principle of client choice.

Offices organized to afford each defendant continuous representation by the same defender might opt to permit clients a considerable degree of choice among their attorneys in most kinds of cases. Offices committed to the so-called “zone defense,” which assigns a different defender to each stage of a case, normally would not be able to permit choice of counsel in the same way, but such offices would afford other advantages that some clients might prefer, such as the assurance that a highly experienced attorney will handle their case if it goes to trial. Finally, a public defender office might conclude that it can best render effective service if its supervisors make the attorney assignment decision without any input from the client at all.

Even this last arrangement is not antithetical to the principle of client choice, provided that the defendant can opt out of representation by a defender office organized in this way and select counsel from the private bar or from a differently organized defender firm instead.⁸² The crucial point is only that defendants

⁸² When a public defender system was initially introduced in Scotland, defendants were required to accept representation by the defender office. But because this approach “proved

unhappy with the package of services provided by a defender office be given the right to switch to appointed private counsel or to a competing practice, just as students choosing among law schools may enroll in one that affords a wide degree of choice among courses and professors, or instead select one that affords less choice but other advantages.

A different concern about evenhandedness among defendants is that habitual offenders, who might have a better sense of the strengths and weaknesses of available counsel, would have an unfair advantage. In a client-choice system, defendants with poor information allegedly would get poor lawyers more often than they do now, while defendants who have the best information, repeat offenders in particular, would benefit.

As an initial matter, it is crucial to see that allowing the knowledgeable indigent defendant to select his lawyer does not necessarily disadvantage the defendant who is less well informed. Even if we assume that criminal defense attorneys can be unambiguously ranked in terms of quality and effectiveness (an assumption I question below),⁸³ existing no-choice regimes do not automatically give the inexperienced defendant an equal chance for the “best” lawyer. In a client-choice system, selection by well-informed defendants will tend to attract better attorneys and drive out the ineffective ones. Over the long run, even the poorly informed defendant is therefore likely to do better than he does in existing regimes that contain no systemic incentive for attorneys to value the satisfaction of their clients.

In any event, the inequality-among-defendants concern, even if plausible over the long run, collapses the minute we measure it against principles we consider self-evident in the context of the *non*-indigent defendant. If defendants of means who are well informed wind up with more than their share of the good attorneys, that inequality is a price we accept to pay without question in exchange for the value of mutual rapport in chosen relationships and, above all, personal autonomy in matters of utmost importance to our lives. Less informed and less careful consumers often do worse than others, but our society does not consider this difference in outcomes inequitable, even for such vital services as health care and retained legal counsel. Should we randomly assign Medicare patients to doctors in order to be sure that those who are less informed have an equal chance to get the

unpopular with both clients and private criminal defence [sic] practitioners . . . [and] soured relationships between public and private solicitors,” it was abolished, and indigent defendants were permitted to choose between representation by the public defender and representation by an attorney of their choice from the private bar. See Goriely, *supra* note 17, at 86, 88. Likewise, in England (where most solicitors serving as indigent defense counsel maintain a private practice), the Legal Services Commission (LSC) began to establish public defender offices in 2001. Where such offices have been established, indigent defendants are permitted to choose between representation by the defender office or by a private solicitor of their choosing. See LEFSTEIN, CASELOADS, *supra* note 4, at 243 (noting that “LSC decided from the beginning that solicitors serving as public defenders in the new offices would have to compete with private solicitors for their clients.”). For more detailed discussion, see Lefstein, *Gideon’s Promise*, *supra* note 17, at 84–90.

⁸³ See *infra* p. 41.

best care? Absent very unusual circumstances that suggest otherwise (mental incompetency, for example), our society harbors little doubt that the advantages of free choice for maximizing consumer welfare far exceed any of its costs.

2. Quality Control

In *Drumgo v. Superior Court*, one of the first cases to explicitly address an indigent defendant's claim to select his own lawyer, the California Supreme Court rejected the claim on the ground (among others) that trial judges are best placed to know the abilities of local counsel and therefore can choose for the defendant a more able attorney than the defendant himself can.⁸⁴

This judge-knows-better argument merits little comment. Even if the attorney whom the judge picks will in some sense perform "better," all else equal, than the lawyer whom the defendant would select, all else is not equal when the defendant's preferences are not honored or never considered. Given the importance of rapport and trust for an effective attorney-client relationship, there is little reason to think that a lawyer chosen by a judge, or other court official, over the defendant's opposition, will win the defendant's confidence more quickly or more effectively than the attorney that the defendant himself wants.

Incentive implications compound this problem. Even if the judge has better information about the competence of attorneys who practice in her court, she has less reason to use that information to make the best possible choice. Indeed, the judge may even use her superior information perversely by appointing lawyers with a reputation for being reasonable and cooperative rather than zealously adversarial.⁸⁵ Any public official who considers attorney effectiveness from the standpoint of the court system has reason to value "reasonable" attorney attitudes, a disinclination to file complicated motions, and other professional traits that might not win the approval of defendants themselves. Lawyers therefore may be assigned according to how well they serve the court system, not how well they serve defendants.

The dangers of a *disincentive* to pick the best lawyer are mitigated or entirely eliminated in those jurisdictions (a minority) in which a local bar association determines attorney eligibility and establishes a random system for assigning eligible attorneys to cases.⁸⁶ The dangers can likewise be eliminated if the bar association or some other body independent of government hires a committed Chief Defender, who (together with her supervisors) assigns cases to the staff attorneys best qualified to handle them.⁸⁷ Even when judges control access to an

⁸⁴ *Drumgo v. Superior Court*, 506 P.2d 1007, 1010 (Cal. 1973).

⁸⁵ See McConville & Mirsky, *supra* note 58, at 688.

⁸⁶ See, e.g., LEFSTEIN, CASELOADS, *supra* note 4, at 193–95 (discussing Massachusetts's system).

⁸⁷ *Id.*

eligibility list, the impediments to using knowledge about attorney quality properly can largely be eliminated if lawyers applying to be included are screened only for ability and cannot be stricken from the list in retaliation for overly adversarial performance.

Yet even when disincentives to select the best lawyer are thoroughly neutralized in these ways, the quality-control argument against client choice remains untenable, for two distinct and equally decisive reasons. First, attorney quality is not an unambiguous or one-dimensional concept. Just as patients with a medical problem prioritize different expertise and different personality attributes when they choose a doctor, a criminal defendant may prefer a lawyer renowned for trial skills or instead for bargaining prowess, one known for an aggressive, no-holds-barred style or instead for the ability to get along successfully with prosecutors and the court. The defendant may feel that he will be most comfortable (or that the jury will connect best) with a male or a female lawyer, with an attorney of his own race/religion/ethnicity or with one of a different race/religion/ethnicity.⁸⁸ Random assignment of counsel from a neutrally maintained eligibility “wheel” can only fortuitously match attorney strengths to client preferences, no matter how scrupulously objective the attorney screening process may be.⁸⁹

If the judge-knows-better argument were cited as a basis for refusing to permit *non*-indigent defendants to choose their own lawyers, courts would quickly dismiss the argument as preposterous. It deserves no more credence in the case of defendants who are indigent.

Can a distinction between indigent and non-indigent defendants rest on an assumption that the indigent are likely to be less sophisticated or to have less familiarity with the legal system? Criminal defendants often have had little previous experience with criminal justice, and the poor may be especially disadvantaged in this regard, since they generally have less contact with lawyers and other sources of information about professional competence. On the other hand, because the poor are disproportionately represented among those accused of serious crime, an indigent defendant is more likely than a middle-class defendant to have faced charges before or to know someone who has.⁹⁰ The middle-class defendant who has used a lawyer to draw his will or to vet his home purchase

⁸⁸ See Kenneth P. Troccoli, *“I Want a Black Lawyer to Represent Me”: Addressing a Black Defendant’s Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1 (2002).

⁸⁹ Assignment of counsel from available public defender staff might in theory be tailored to client preferences of these sorts, but this practice does not seem to be common (or even uncommon), and it often would prove infeasible or ethically problematic (as, for example, if a defendant refused to accept a female attorney or insisted on being represented by counsel of his own race). See *id.*

⁹⁰ Though indigents probably represent no more than 10–20 percent of the population, they account for 80 percent of those charged in felony cases. See Andy Court, *Is There a Crisis?*, AM. LAW., Jan./Feb. 1993, at 46.

contract is no more likely to have direct access to the world of criminal defense practice than an indigent defendant is. The assumption, therefore, that a defendant with means is better able to judge attorney quality or to avoid the predations of the “ambulance chaser” can only rest on middle-class bias and patronizing paternalism. The observations of a student of English criminal justice seem fully pertinent to the American context in this regard:

One should guard against the snobbery which suggests that because most clients are poor, ill-educated and socially disadvantaged they are incapable of making rational choices. Instead, it is fair to assume that the poor know more about surviving the system than the rest of us, and tend to be more adept at recognizing condescension or disrespect.⁹¹

Like many other reasons offered for opposition to client choice, the judge-knows-better argument instantly collapses if considered through the lens of the values we honor without hesitation outside the indigent defense context. Absent special “market-failure” conditions, a voluntarily chosen transaction between seller and customer is the essential Econ-101 prerequisite to maximizing the welfare of all parties concerned. Yet the situation in indigent defense is analogous to one in which senior citizens suffering from serious illness could receive state-funded treatment under Medicare only if they accepted a particular doctor designated by a government bureaucrat. The economic and medical efficacy of such an arrangement is dubious, to say the least, and its political acceptability can safely and without hyperbole be placed exactly at zero.

The denial of choice to the indigent defendant in need of legal services not only violates free-market principles in just the same way, but in two respects it is far worse. First, the indigent criminal defendant seeks services that are afforded as a matter of constitutional right, a status that, for better or worse, neither our courts nor our political branches have ever contemplated extending to health care. And unlike the situation that would obtain if Medicare recipients were denied the option to choose their own doctor, in criminal defense the government’s privilege to designate the provider is infected by a profound conflict of interest: the agency that chooses the lawyer charged with protecting the individual from the abuse of state power is almost always tied, directly or indirectly, to the same authority that is seeking to deploy that power in order to take away the individual’s liberty.

Because different defendants face different tactical problems, they may prefer attorneys known for different styles and skills. One especially crucial determinant of lawyer quality is trust, and trust is often based on a prior relationship. In *Ely*,⁹² the defendant sought the appointment of Lawyer A, who had represented him well

⁹¹ Tamara Goriely, *Revisiting the Debate over Criminal Legal Aid Delivery Models: Viewing International Experience from a British Perspective*, 5 INT’L J. LEGAL PROF. 7, 23 (1998).

⁹² *United States v. Ely*, 719 F.2d 902 (7th Cir. 1983).

in the past. The Seventh Circuit decision forced Ely to accept the services of Lawyer B, on the assumption that some other defendant might also want Lawyer A's services. Yet, for all we know, that hypothetical defendant might have had a prior relationship with B and preferred the lawyer (B) whom Ely was trying to get rid of.

The Seventh Circuit decision inflicts Lawyer B on Ely and inflicts Lawyer A on the other (hypothetical) defendant, even though each defendant may prefer the "Pareto optimal" swap. As in most other areas of economic activity, allocation by official decision prevents mutually beneficial gains from free market exchange unimpeded by legal obstacles. Judge Posner, perhaps more than any other modern jurist or legal academic, deserves credit for winning legal and social recognition for this principle. There is no evident reason why it should not be given *at least* as much weight in the criminal defense context as elsewhere.

3. Defense Counsel Idealism

In the current indigent defense environment, many idealistic and exceptionally able lawyers volunteer to help serve the poor, in return for remuneration well below what they could earn in other fields of law. If client choice makes the profit motive more conspicuous in indigent defense practice, would fewer of these highly motivated attorneys lawyers be attracted to work in the field of indigent criminal defense? Because attorney idealism currently plays such a large role in assuring that the quality of indigent defense representation drops no lower than its current levels, anything that might undercut that idealism represents a danger to be taken quite seriously.

The simple answer, however, is that the client-choice approach does not in any way make the profit motive more important in indigent defense practice than it already is. The heart of the client-choice concept is not *profit maximization* per se, but mutual trust and confidence, fostered by making the attorney-client relationship *voluntary* for both parties. As a result, nothing in the client-choice concept prevents excellent attorneys with highly successful private practices from continuing to place their names on the list of lawyers available to accept indigent defense appointments. Similarly, nothing would prevent bar association committees from establishing or maintaining nonprofit defender organizations that would hire idealistic lawyers on salary. Such nonprofits already exist in several jurisdictions, and presumably they would have no need to revise their charters or their central philosophical commitments and *esprit*. A Public Defender run as an agency of state or local government could likewise accentuate an ethos of public service when it recruits, trains and supervises its staff.

In a client-choice approach, non-profit defender organizations and successful lawyers who offer their services pro bono should have no difficulty attracting indigent clients when the quality of their representation reflects their ideals. Indeed a client-choice model would *systematically favor* idealistic lawyers and public defenders over profit-oriented firms. The reason is that an ethos of public

service would allow non-profit defender agencies and practice groups to recruit excellent, altruistic lawyers at salaries well below what such lawyers could earn elsewhere. That advantage over profit-oriented firms in terms of outlay for attorney compensation would enable the idealistic practice group or service-oriented Public Defender, even when having comparable revenue from a comparable number of indigent defense clients, to hire larger staffs, to provide more support services and to maintain lower lawyer-client caseload ratios than profit-oriented firms could offer.

In short, the dynamics of voluntary choice in a “free market” should insure that idealism and an altruistic commitment to serving the poor would play a *larger* role in indigent defense representation than they do at present.

D. Can a System of Client-Choice Affirmatively Help Indigent Defendants?

A final argument against the client-choice model suggests that this approach, even if not actually harmful to clients, cannot really offer them any meaningful *help*. This argument stresses the egregious underfunding of indigent defense in virtually every jurisdiction and emphasizes that unless more resources are made available, no other reform can yield any discernible benefit for the indigent defendant. And conversely, if a substantial infusion of additional resources *is* forthcoming, indigent defense systems then will be in a position to deliver respectable services, the argument goes, even if the currently universal no-choice system is maintained; under those circumstances, it is claimed, there will no longer be any need to consider undertaking the complexities of a client-choice approach.

Like other arguments against the client-choice model, this objection is on its face quite plausible. But on close examination, it proves unconvincing and indeed fundamentally misdirected. Contrary to the thrust of this concern, freedom of choice for the indigent client is a critical element in any effort to improve the delivery of indigent defense services.

Consider first, the more depressing scenario—the one in which the resources available for indigent defense remain grossly inadequate. Under these circumstances, the pool of attorneys who represent indigent defendants will continue to include, on the one hand, excellent lawyers who serve out of a sense of obligation or altruism and, on the other, minimally competent or relatively unsuccessful attorneys who have few alternative practice options. Because a viable client-choice system requires that the attorney-client relationship be fully voluntary and mutually chosen, conscription of unwilling attorneys to serve can be no more acceptable than involuntary assignment of defendants to counsel whom they do not want. It might seem, therefore, that low resource levels, when combined with the elimination of attorney conscription, would reduce the proportion of indigency cases handled by the very best attorneys.

Once put into effect, however, a client-choice system is more likely to have the opposite impact. The only lawyers who would drop out of the indigent defense pool under these circumstances would be those who prefer not to be appointed.

These unwilling or unenthusiastic defense attorneys are precisely the ones who are most likely to seek ways to cut corners in factual investigation, client counseling, and plea negotiation, so that they can minimize the time they are obliged to devote to indigent clients. The end of conscription would not preclude able attorneys from serving at below-market rates. To the contrary, the absence of conscription would help insure that the attorneys who serve are participating out of idealism and genuine concern for client interests.

Nonetheless, if resource levels stay low, less able attorneys will remain in the pool of providers as well, and under those circumstances, prospects for effective assistance for the defendants they represent can be dim. It is therefore important to see that in this worst of the worst-case scenarios (minimal resources and a large proportion of minimally competent attorneys) client choice becomes an especially advantageous safeguard. Client choice gives the less successful attorneys, who may place particularly high value on indigent defense assignments, a strong incentive to please their clients in order to continue to attract this much-appreciated source of business. At the same time, the choice option gives indigent defendants a means to escape from the worst (or least trusted lawyers) and gives these defendants some reason to have confidence in an attorney whom they have decided to accept.

Although client choice therefore has value even when resource levels remain low, there is one respect in which one might worry that a choice system could sap some of the political pressure to provide better funding for the system. It might be argued that Public Defender agencies now provide an organized political voice for the allocation of more resources to indigent defense. As a result, if a choice system led to shrinkage of the public defender caseload and staff by diverting more cases to the private bar, this current source of pressure for funds to support indigent defense would be weakened.

We might doubt, however, whether public defender agencies now wield potent political power, and in any event other sources of pressure for indigent defense funding (such as the National Legal Aid and Defender Association and the National Association of Criminal Defense Attorneys) would remain as strong or stronger than before. Indeed, if the private bar came to have a greater stake in indigent defense practice, there is no reason to think that these private attorneys would be less effective than public defenders in lobbying government to support indigent defense more generously. If anything, the track record of military contractors and private prison corporations suggests that firms selling goods and services to the government for profit do not lack for success in winning political support.

Moreover, there are other reasons to expect that the choice model will tend to bring *more* resources into the indigent defense system, not less. Client choice, combined with a ban on attorney conscription, will make the inadequacy of a jurisdiction's current funding levels more visible. Such jurisdictions, faced with a shortage of attorneys willing to serve at prevailing rates, would need to induce more attorneys to serve the indigent voluntarily, lest case processing grind to a

halt. That imperative, driven by the needs of prosecutors and court officials themselves, would then become a source of powerful pressure to allocate more resources, raise hourly compensation rates and the like. In addition, because cases handled by assigned counsel, who lack public-defender economies of scale, usually result in higher per-case expenditure than do cases handled in a defender office, governments would have a strong incentive to ameliorate the public defender's shortage of resources, so that clients would opt for the form of representation most likely to minimize overall indigent defense costs for local government.

Norman Lefstein suggests, moreover, that client choice, far from weakening the public defender's political voice and power, is likely to have just the opposite effect. An overloaded attorney in a public defender office would no longer need to file a motion seeking court permission to decline cases and would no longer need to fear disapproval of her superiors if she sought to do so, because clients would solve her problem for her by opting for representation by a private attorney instead. And once a choice system began to permit indigent clients to shun overtaxed public defenders, defender offices lacking for resources would be forced "to become more aggressive and perhaps more convincing in seeking additional financial support."⁹³

Finally, consider the most optimistic scenario—the one in which resource levels somehow rise, with or without the impetus provided by a client-choice system. With increased funding, indigent defendants would presumably be better represented. Even so, client choice would remain a crucial safeguard. Public defenders and appointed attorneys would discover that they were able, perhaps for the first time, to devote adequate effort to their cases. And if idealistic, these attorneys would need no other reason to take advantage of the opportunity. But in a no-choice model, indigent defense attorneys still would have no *material* incentive to do so. Unless strongly motivated by an altruistic commitment to serving the poor, they have no affirmative reason—in a no-choice system—to do the best possible job for their clients.⁹⁴ In fact, if indigent appointments become financially attractive and if public defender salaries are raised to more nearly approach market levels, the attorneys involved will have even stronger reasons than at present to win the approval of the government officials, judges, and court administrators upon whom their positions and financially attractive practice

⁹³ LEFSTEIN, CASELOADS, *supra* note 4, at 248.

⁹⁴ Cf. Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700 (2013). Steiker cautioned that:

Even adequate resources . . . would not be sufficient to solve some of the structural problems that undergird the country's indigent defense crisis. The lack of adequate organization, training, and oversight of indigent defense lawyers by experienced leaders; the lack of crucial independence from the political and judicial branches that many such lawyers and public defense organizations face; and the absence of a robust culture of client-centered, zealous advocacy all prevent the delivery of decent indigent defense services just as surely as the lack of adequate material resources.

opportunities depend. Thus, even in circumstances characterized by ample funding, client choice will remain essential to guarantee that the attorney's top priority is to satisfy her client rather than the court.

Client choice likewise would remain essential, even under conditions of ample funding, to ensure that clients were *aware* of where the loyalties of assigned counsel or their public defender would lie, so that defendants would have confidence in their attorney's commitment to them. Norman Lefstein observes that the head of the public defender office in Edinburgh, Scotland, fully supported the arrangements permitting indigent defendants to decide whether to be represented by his office or by a private solicitor instead, because he "was convinced that trust and confidence in his solicitors would be greatly enhanced if they were selected by clients instead of being assigned by the courts."⁹⁵

In sum, constrained resources, vulnerable financial support, and/or implicit conflicts of interest are embedded in the basic structure of all assigned counsel arrangements, public defender systems, and virtually any other approach in which the defendant is allowed no say in selecting the attorney who will represent him. Both theory and practical considerations, in so far as we can speculate about them, all suggest that a client-choice model would generate unequivocal gains for indigent defendants and for the adversary system as a whole. But theory, even when combined with common sense appreciation of realities on the ground, is no substitute for actual experience. Therefore, the ultimate test of a client-choice model is its ability to succeed in the crucible of a complex working court environment. The next section describes the effort to meet this test by implementing a client-choice approach in Comal County, Texas.

III. IMPLEMENTATION IN TEXAS

A. *The Texas System(s) for Delivering Indigent Defense Services*

Criminal court organization in Texas is highly decentralized. In each of the state's 254 counties, local trial judges determine most details of docketing, caseflow, and case processing, subject only to general requirements, broadly outlined in the Texas Code of Criminal Procedure. Each county formulates its own indigent defense plan, tailored to local circumstances and the preferences of the

⁹⁵ LEFSTEIN, CASELOADS, *supra* note 4, at 244. Lefstein notes that the Scottish system initially assigned some indigent defendants to the public defender while permitting others to get representation from a private solicitor of their choosing. During the period when this system was in place, "clients consistently registered lower 'levels of trust and confidence' in their public defender solicitors compared to clients who selected their own private solicitors." *Id.* Largely for that reason, the practice of assigning some defendants to the public defender was halted in 2000, and public defender solicitors were thereafter required to compete with private solicitors for the business of indigent criminal-defense clients.

judges serving in its District Courts (which handle felony cases) and its County Courts at Law (which process misdemeanors). And until recently, each county bore responsibility for paying the entirety of its indigent defense budget. Today that situation has been modestly alleviated; state funding now defrays approximately 13% of county expenditures for indigent defense.⁹⁶

Though many fundamentals of assigning counsel to the indigent are similar from one Texas county to another, it is only a slight exaggeration to say that the state has, in effect, 254 distinct systems for providing representation to indigent criminal defendants. And there is variation even between various courts within a given county. Jennifer Laurin describes the state as having “hundreds of indigent defense micro-systems.”⁹⁷

The public defender model is a comparative rarity in Texas, even in its larger cities. Dallas County is an exception. With an estimated 2013 population of approximately 2.4 million, Dallas has long had a substantial Public Defender Office; in 2013, the office handled over 43,000 juvenile, misdemeanor and non-capital felony cases, comprising approximately two-thirds of the total Dallas County indigent caseload (but accounting for just under one-half of all expenditures for indigent defense).⁹⁸ In contrast, nearby Tarrant County (Fort Worth) with an estimated 2013 population of approximately 1.8 million, has no public defender; all of the county’s indigent criminal defendants (28,225 of them in 2013) are represented by appointed counsel.⁹⁹

Other than Dallas, only El Paso relies on a public defender for the bulk of indigent defense representation. In 2013, El Paso County had 19,138 indigent cases, 53% of which (including two capital murder cases) were handled by its public defender.¹⁰⁰

Harris County, with an estimated 2013 population of 4.3 million, is home to Houston, the largest city in Texas and the fourth largest city in the United States;

⁹⁶ See Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense* 12 Ohio St. J. Crim. L. 325 (2015).

⁹⁷ *Id.* at 16 n.104.

⁹⁸ In 2013, the Dallas County public defender handled 43,407 cases on a budget of slightly under \$11,795,000; 24,111 cases were handled by assigned counsel for fees totaling nearly \$14,296,000. No cases were handled by contract counsel. See Texas Indigent Defense Commission, *Dallas County Dashboard*, <http://tidc.tamu.edu/public.net/Pages/CountyDashboard.aspx?cn=Dallas> (last visited Oct. 12, 2013). In accordance with the norm generally observed throughout the world of indigent defense, average cost per case was substantially lower for public defender cases (\$272) than for those handled by assigned counsel (\$593), though this crude comparison does not account for possible differences in case complexity between the two groups of cases. *Id.*

⁹⁹ See Texas Indigent Defense Commission, *Tarrant County Dashboard*, <http://tidc.tamu.edu/public.net/Pages/CountyDashboard.aspx?cn=Tarrant> (last visited Oct. 12, 2013). For an expenditure of \$14,390,084.40, Tarrant County’s appointed-counsel cost per case averaged \$510. *Id.*

¹⁰⁰ See Texas Indigent Defense Commission, *El Paso County Dashboard*, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=71&fy=2013> (last visited May 18, 2015).

yet it had no public defender until 2011. In that year, the newly established defender office handled only 611 of the county's 75,000 cases. By 2013, the Harris County Public Defender Office had grown, but appointed counsel still represented 84% of Harris County's indigent criminal defendants; contract counsel represented another 10%.¹⁰¹ Public defenders handled 4,600 cases, still only 6% of the county's indigent defense total,¹⁰² and the local bench and bar continue to mount strong resistance to permitting further growth in the share of indigent criminal defendants represented by the public defender.¹⁰³ In part because expenditure per case for assigned-counsel representation has traditionally been so low in Houston, the public defender's average case processing cost has been significantly higher, an inversion of the pattern usually found elsewhere.¹⁰⁴

Travis County (Austin), with a 2013 population of 1.1 million is an intermediate case. Like Dallas, it has long had a public defender, but the Travis office's caseload has always been small; in 2013 it handled only 11% of the county's 28,000 indigent defense cases.¹⁰⁵ And unlike the similarly small Harris County Public Defender, which handles a mix of juvenile cases, misdemeanors and non-capital felonies, the Travis Public Defender's docket is largely confined to juvenile cases, with a smattering of misdemeanors but no felonies.¹⁰⁶

In the other large counties, a public defender, if available at all, represents only a small fraction of the indigent defendants. In 2013, Bexar County (San

¹⁰¹ See Texas Indigent Defense Commission, *Harris County Dashboard*, <http://tidc.tamu.edu/public.net/Pages/CountyDashboard.aspx?cn=Harris> (last visited Oct. 12, 2013) [hereinafter *Harris County Dashboard*].

¹⁰² *Id.*

¹⁰³ See Laurin, *supra* note 96.

¹⁰⁴ In 2013, costs per case averaged \$1,930 for the public defender and only \$338 for the county's combined contract-counsel and assigned-counsel cases. *Harris County Dashboard*, *supra* note 101. Harris County has a substantial volume of capital cases (67 indigent capital cases in 2013), but the public defender's relatively high average cost per case was not due to capital representation; all of Harris County indigent capital cases were handled by assigned counsel. Conversely, the \$338 average cost for assigned and contract-cases might seem remarkable considering that these attorneys provided representation for 67 capital defendants. But since those cases accounted for only 1% of all assigned and contract-cases, the much larger expenses incurred in these cases had little impact on the average cost for indigent cases overall. In 2013, the costs per case of representing indigent capital defendants in Harris County averaged \$24,113 for counsel fees, \$3,634 for investigators, and \$4,087 for expert witnesses. *Id.*

¹⁰⁵ See Texas Indigent Defense Commission, *Travis County Dashboard*, <http://tidc.tamu.edu/public.net/Pages/CountyDashboard.aspx?cn=Travis> (last visited Oct. 12, 2013) [hereinafter *Travis County Dashboard*]. As in Harris County, costs per case in Travis differ from the usual pattern, averaging \$659 for the county's public defender and \$263 for its assigned counsel cases. *Id.* In 2013, Travis County had 27 capital murder cases (just under 1% of its total caseload), and all the indigent capital cases were handled by assigned counsel. The costs of representing each indigent capital defendant were dramatically lower than in Harris, averaging \$3,038 for counsel fees, with no significant expenditure (on average) for capital-case investigators and expert witnesses (\$56 and \$98 per case respectively). *Id.*

¹⁰⁶ *Id.*

Antonio) had nearly 40,000 cases, but only 2% of them (640 cases, almost all misdemeanors) were handled by the public defender. In the same year, a public defender handled 24% of the 14,800 cases in Hidalgo County and 11% of the 8,100 cases in Cameron County (Brownsville). Most of the remaining counties of significant size, such as Galveston and Lubbock (7,764 and 7,020 indigent defendants in 2013 respectively), rely entirely on appointed counsel, as do nearly all of the many smaller counties.¹⁰⁷

B. *The Texas Indigent Defense Commission*

In response to intense dissatisfaction with Texas's overly decentralized and chronically underfunded approach to indigent defense, the Texas legislature established a state-wide agency in 2001.¹⁰⁸ The Texas Indigent Defense Commission (TIDC) operates under the direction of a governing board chaired by the Presiding Judge of the Texas Court of Criminal Appeals and consisting of thirteen members, eight (primarily appellate judges) serving *ex officio* and five appointed by the governor.

TIDC was granted no authority to coordinate or approve local indigent defense plans; the counties and their local judges retained complete autonomy. But TIDC was charged with providing counties with both technical support and (limited) financial assistance, in order to help them enhance the quality and cost-effectiveness of their indigent defense systems. In addition, TIDC was given a crucial information-gathering function. In an environment where it had been difficult to get even rudimentary facts concerning local expenditures and practices, the new legislation required counties to report pertinent details annually to TIDC, in order to facilitate planning and measures to improve indigent defense services.

With an annual operating budget of approximately \$48 million,¹⁰⁹ TIDC provides direct grants to county-level indigent-defense programs. Much of the money is allocated in accordance with a pre-defined formula, but TIDC also controls discretionary grants, which it can use to encourage innovation and reform at the county level.

¹⁰⁷ There are scattered exceptions. For example, in 2013, Wichita County (population 132,057) used a public defender to represent 42% of its 2,713 indigent criminal defendants. See *Travis County Dashboard*, *supra* note 105.

¹⁰⁸ For discussion of the legislative controversy that led to the establishment of the Texas Indigent Defense Commission, see Laurin, *supra* note 96, at 20–21.

¹⁰⁹ See TEXAS INDIGENT DEFENSE COMMISSION, OPERATING BUDGET FOR FISCAL YEAR 2014, (2013), available at http://tidc.texas.gov/media/21582/operating-budget_tidc_fy14.pdf (last visited Oct. 12, 2014).

C. The Comal County Pilot Program

1. Background

In September 2010, a client-choice proposal inspired by free-market principles was put forward in a CATO Institute policy paper.¹¹⁰ TIDC's executive director, Jim Bethke, took notice and sought to find an appropriate venue in which to test the idea—one large enough to offer relevant lessons, but small enough to permit outreach and explanation of the unfamiliar concept to all significant stakeholders. Bethke quickly identified Comal County as a suitable, mid-sized jurisdiction, and initiated the personal contacts necessary to convince the county's judges and key members of the local bar to accept and willingly support the project.

TIDC's operating environment makes it impossible for its leadership to promote reform through "top-down" pronouncements or logically persuasive position papers. Instead, everything it seeks to accomplish must of necessity win the voluntary support of independent judges and other local officials who enjoy autonomy with regard to indigent defense policy in their own jurisdictions. Personal one-on-one contact, carefully cultivated trust, and individual "buy-in" from every interested party therefore have been indispensable. Winning local endorsement for client choice was no exception.

That said, the concept of client choice apparently did not prove exceptionally difficult to sell—perhaps because Texas has never sought to funnel the lion's share of its indigent defense cases to an institutional public defender, or perhaps because the political climate is not intrinsically skeptical of free-market alternatives to government-run services.

Another reason for the lack of significant resistance to client choice may have been that Comal, like any jurisdiction with a well-run assigned counsel program, already had much of the necessary infrastructure in place. The county has an established system for screening attorney eligibility for appointment on the basis of qualifications and reputation; it has a procedure for regularly monitoring attorney performance and removing unqualified lawyers from the list; and the judges are already accustomed to reviewing attorney compensation requests, to protect against excessive or unjustified fee submissions.

Moreover, under the conditions already in place, client choice would not appear to threaten the personal interests of key stakeholders. The Comal judges, unlike their counterparts in Harris County (Houston) and other counties throughout Texas, long ago converted their attorney assignment system to automatic appointment by rotation, so that they apparently do not seek to retain personal control over the flow of indigent defense business to particular attorneys. And prominent indigent defense practitioners seem to feel that client choice could work

¹¹⁰ SCHULHOFER & FRIEDMAN, REFORMING INDIGENT DEFENSE, *supra* note 21.

to their benefit. Many seem confident that their reputation for zealous advocacy can prevent a significant loss of clientele and apparently were attracted to the prospect that a healthier attorney-client relationship might result when indigent defendants requested their services instead of being assigned to them by the court.¹¹¹

2. The Setting¹¹²

Located in a semi-rural and recreational area roughly midway between Austin and San Antonio, and with a 2013 population estimated at 116,524, Comal County can be considered a mid-sized Texas jurisdiction. Its indigent defense docket (1,495 cases in 2013), though small by the standard of many American jurisdictions, places it well above the Texas median; almost 80% of Texas's 254 counties had fewer than 1,000 indigent criminal cases in 2013.¹¹³

Like all Texas counties, Comal maintains separate court systems for juvenile cases and for misdemeanors (tried in its two County Courts at Law) and felonies (tried in its four District Courts). The 2013 docket of 1,495 indigent cases consisted of 523 non-capital felonies,¹¹⁴ 860 misdemeanors, 111 juvenile cases and one appeal, all of which were handled by assigned counsel. The county has six active judges who handle adult criminal cases, one for each of the District and County courts.

Prior to implementation of the client-choice initiative, lawyers assigned to indigent defendants were selected from one of three lists. List A consists of attorneys approved to handle any felony case. List B includes lawyers eligible to

¹¹¹ In one recent news report on the Comal project, Texas criminal defense attorney Mitch Adams noted that in existing systems for assigning counsel to the indigent “[t]here can be a level of distrust there,” and said that the new system, could push attorneys to earn an indigent defendant's business. “I think that it's going to primarily boil down to a lawyer's reputation. Believe me, lawyers have reputations in the county detention centers and places like that.” See Holly Gonzalez, *E. Texas legal experts weigh new indigent defense system*, KLTN (Jan. 6, 2015, 9:30 PM), <http://www.kltv.com/story/27777564/e-texas-legal-experts-weigh-new-indigent-defense-system>. Similarly, Texas criminal defense attorney Bobby Mims said that the theory behind the new program is that “we're going to have more satisfied defendants. They're going to be able to hire their own lawyer, so therefore they should be better pleased with their outcome.” *Id.*

¹¹² Except as otherwise noted, all data and other information in this section are drawn from Texas Indigent Defense Commission, *Comal County Dashboard*, <http://tidc.tamu.edu/public.net/Pages/CountyDashboard.aspx?cn=Comal> (last visited Oct. 12, 2014) [hereinafter *Comal County Dashboard*], and from the author's discussions with Norman Lefstein, Edwin Colfax, Jim Bethke, and knowledgeable local officials.

¹¹³ See Texas Indigent Defense Commission, *Indigent Defense Expenditure Report Results: Total Indigent Defense Costs and Cases for 2013*, <http://tidc.tamu.edu/public.net/Reports/ExpenditureReportResults.aspx> (last visited Jan. 25, 2015).

¹¹⁴ *Comal County Dashboard*, *supra* note 112. Capital cases, if any, are handled under a regional plan—in the case of Comal, the Third Administrative Judicial Region Death Penalty Plan.

represent defendants only on less serious felony charges—either third-degree felonies or “state jail” felonies. List C includes lawyers approved only to handle misdemeanor cases. Attorneys who wish to take indigent defense assignments apply for eligibility, and after screening of their qualifications, approved attorneys are added to one of the three lists, but they do not necessarily know which one. Judges review the lists periodically and can promote an attorney to a higher list. They can also remove a previously approved attorney from a list, although this apparently has not happened often.

In the procedure followed prior to the implementation of client choice, a defendant was informed—at first appearance before a judge or magistrate—of his right to request the appointment of counsel if he could afford to retain his own lawyer. The defendant was given an application form on which, after detailing his income and assets, he could sign a request for the court to appoint counsel. But unlike many Texas counties, Comal did not give the judge a role in selecting the attorney to be appointed. When a defendant qualified as indigent, the judge or magistrate forwarded his application form to the office of the court administrator for the district or county court, which then selected an attorney from the appropriate list and notified the attorney of his or her appointment to the case.

Attorney compensation was (and still is) governed by a published fee schedule, but rates are stated in wide ranges rather than in specific dollar amounts per case or per hour. Thus, in a felony case, the scheduled fee is \$500 to \$650 for a guilty plea and \$400 to \$750 per day for a jury or bench trial; compensation for other services is at rates of \$50 to \$100 per hour for in-court time and \$50 to \$80 for out-of-court time.¹¹⁵ Judges must approve assigned-counsel vouchers, and in felony cases they have wide discretion to select the compensation rate they consider appropriate within the authorized range.¹¹⁶ In misdemeanor cases, the scheduled fee for a guilty plea is either \$250 or \$300 per case, depending on the seriousness of the charge; other services in-court or out-of-court are compensated at the same rates as those paid in felony cases.¹¹⁷ Actual compensation for assigned attorneys has been quite low, averaging \$671 per case for felonies and

¹¹⁵ Compensation for felony appeals is at a rate of \$60 per hour, with a minimum of \$500 and a maximum of \$7,500. Order Adopting Local Rules for Appointment of Counsel in Criminal Cases and Schedule of Fees for Payment of Compensation to Appointed Counsel (2013) [hereinafter COMAL DISTRICT COURT ATTORNEY FEE SCHEDULE], *available at* <http://tidc.tamu.edu/IDPlanDocuments/Comal/Comal%20District%20Court%20Attorney%20Fee%20Schedule.pdf>.

¹¹⁶ The current reporting system for fees paid permits an accounting of the amount of the fee paid to each attorney in each case, but because the hours or days billed do not appear on the voucher when it is sent for payment, there is little transparency in ascertaining actual compensation rates or the criteria judges use in setting them. COMAL COUNTY COURT PLAN (2015), *available at* <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=409>.

¹¹⁷ Compensation for misdemeanor appeals is at a rate of \$60 per hour, with a minimum of \$500 and a maximum of \$2,500. COMAL COUNTY ATTORNEYS FEE SCHEDULE, *available via* <http://tidc.tamu.edu/public.net/Reports/FeeDocuments.aspx#C>.

\$241 per case for misdemeanors in 2013;¹¹⁸ the latter figure is even lower than the scheduled minimum fee for a guilty plea to the least serious misdemeanor.¹¹⁹

Also relevant to the financial picture is the convicted defendant's obligation to reimburse the county for the costs of his defense, to the extent he is able to do so.¹²⁰ The reimbursement obligation is taken seriously in Comal, as it is throughout Texas.¹²¹ In 2013, defendants paid back more than \$87,000, representing over 13% of the total cost of indigent defense in that year.¹²²

3. Implementation of Client-Choice¹²³

It would not appear very difficult to move from the pre-choice system to one in which the defendant makes the decision about which attorney will be assigned to his case. At the point where a court administrator would pick a lawyer's name from a list of those eligible, the defendant would simply pick the name instead. In practice, however, the mechanics of making this shift required far more thought than the theory of client choice would have predicted.

When court officials are accustomed to taking particular steps at particular times, using particular, carefully drafted forms to do so, considerable precision is required to assure that the steps taken remain apt, that cases are not sidetracked, and that the forms employed continue to provide defendants and relevant court officials with accurate information. Paperwork must continue to flow in an orderly

¹¹⁸ For Comal's lone indigent appeal in 2013, assigned counsel was paid a fee of \$4,100.

¹¹⁹ The low average per case may be a consequence of the way that guilty plea representation is compensated when a defendant faces multiple charges. Such matters apparently are counted as multiple "cases"; the scheduled fee is either \$250 or \$300 for the first such "case" but only \$50 for each additional "case." COMAL COUNTY ATTORNEYS FEE SCHEDULE, *supra* note 116.

¹²⁰ See *supra* text accompanying notes 66–68.

¹²¹ See TEX. CODE CRIM. PROC. art. 26.05(g) (Vernon 2011) ("If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided . . . the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay."); see also *Curry v. Wilson*, 853 S.W.2d 40, 46 (Tex. Crim. App. 1993) ("Texas has a significant interest in assuring that persons with the financial resources to pay for their own representation do not take a free ride at the expense of its taxpayers."); but cf. *Mayer v. State*, 309 S.W.3d 552, 553 (Tex. Crim. App. 2010) (holding that an order to repay fees for appointed attorney is invalid if trial court fails to determine that the defendant was able to pay those fees). TIDC reports that in 2010 some Texas counties recouped up to 63% of their indigent defense costs. TEXAS INDIGENT DEFENSE COMMISSION, ORDERS FOR REPAYMENT OF APPOINTED ATTORNEY COSTS UNDER CODE CRIMINAL PROCEDURE ARTICLE 26.05(G) 1, available at <http://www.tidc.texas.gov/media/16676/Attorney-Fee-Recompment-Procedures-and-Orders.docx> (last visited May 26, 2015).

¹²² Some of the reimbursement no doubt pertained to indigent defense fees paid in a prior year, but since total indigent defense costs have risen very slowly, the reimbursement rate is roughly the same if amounts reimbursed are taken as a percentage of the prior year's indigent defense outlays.

¹²³ For the options described in this section, I am substantially indebted to conversations with TIDC, the Justice Management Institute, and Norman Lefstein.

manner through the system, and other ministerial but important processes must continue to function smoothly.

Most complexities of this sort involve the kind of one-time start-up costs that do not, in themselves, present a significant obstacle to changing the status quo; such difficulties presumably would diminish substantially or vanish altogether in jurisdictions that sought to profit from the tools and experience that a pilot project can generate. Nonetheless, this section first considers these purely mechanical aspects of implementation, to give some flavor of the formal details that require care and attention.

Following that introduction, this section turns to substantive concerns and in particular to three nettlesome issues—the restrictions (if any) on *which attorneys* the indigent clients will be permitted to pick; the *information* (if any) about eligible attorneys that the court and other sources will be able to convey to indigent defendants, especially to those held in custody; and the *time constraints* (if any) that indigent defendants will be required to respect in making their choices. In all three respects, practical considerations exert a pull away from approaches that would be appropriate not only in a pure “free-market” transaction but even in the regulated market that governs the relationship between a lawyer and a non-indigent client.

i. The Mechanics

At first appearance in Comal County, a person arrested on a felony charge generally appears before a magistrate at the county jail. Misdemeanor arrestees may likewise have their first appearance before a magistrate or may instead be arraigned before a judge in the County Court at Law.¹²⁴ In either case, Texas law requires that at the time of first appearance, the arrestee must be advised of his rights and informed that he has the “right to request the appointment of counsel if the person cannot afford counsel.”¹²⁵

Prior to implementation of client choice, the Comal courts used two forms for that purpose. The first, a “Magistrate’s Warning,” advised the defendant that if he meets the indigency standard, counsel will be appointed for him if he so wishes. The second form (“Application of Indigence and Request for Appointment of Counsel”) called for the information necessary to determine indigency and provided a place for the defendant to sign the statement that “I hereby request the Court to appoint counsel to me.” When a defendant who meets the indigency standard signed this request, the latter form was forwarded to the Office of Court

¹²⁴ Similarly, when a felony defendant is arrested pursuant to a warrant, the warrant typically specifies the bond required to qualify for pretrial release, and if the defendant makes bond promptly, he will be released immediately, and his first appearance therefore will be before a judge of the District Court. *Criminal District Attorney - Case Handling*, COMAL COUNTY, http://www.co.comal.tx.us/CDA/Case_Handling.htm (last visited May 26, 2015).

¹²⁵ TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (Vernon 2009).

Administration, which then selected a qualified attorney from the appropriate list and notified the attorney of the appointment.

A client-choice program clearly will require modification of both forms. For example, because many indigent defendants have had experience with the no-choice approach, either in Comal County or elsewhere, it would seem prudent to communicate clearly to all defendants the fact that the familiar no-choice system was no longer operative. Accordingly, the Magistrate's Warning presumably must be modified to draw specific attention to the new regime, by stressing that the defendants will be able to choose their own lawyer and that the court will select an attorney only when a defendant prefers not to do so.

The second form presumably will require more extensive changes. This second form ("Application of Indigence and Request for Appointment of Counsel") had previously provided indigent defendants who wanted representation only one option ("I hereby request the Court to appoint counsel ..."). A revised form presumably will have to make clear that in the new approach, defendants will have three distinct options. First, a defendant who wants to choose his own lawyer and knows of one or more whom he likes will need a place on the form to list the names of those lawyers in order of preference. Alternatively, for the defendant who wants to choose his own lawyer but does not know the name of any particular attorney whom he prefers, the form presumably will have to have a place where the presiding magistrate or judge can insert the date and time by which the defendant must make his choice and report it back to the court. Finally, for the defendant who does not want to choose his own lawyer, the form will have to retain the usual option for the defendant to request that the court appoint counsel for him.

After a defendant selects one of the three options, the appointment process will no doubt require procedural steps beyond those that were sufficient before. Of course, if the defendant asks the court to appoint counsel for him or if he declines to make any choice, the magistrate or judge who presides at first appearance will presumably send the paperwork to the Office of Court Administration, which will then assign counsel to the case according to the usual pre-choice procedure. But if the defendant indicates the name of the lawyer(s) he wants to choose, the presiding officer presumably will have to verify that at least one of the lawyers named is on the list of attorneys eligible to be appointed. If so, the presiding official presumably would send the paperwork to the Office of Court Administration, so that the first of the available lawyers on the defendant's list can be appointed. If none of the lawyers whom the defendant names is eligible for appointment, the presiding judge or magistrate presumably would have to inform the defendant to that effect, so that the defendant could provide additional attorney names or select one of the other options.

The paperwork and procedures presumably will have to become even more detailed when a defendant wants to exercise the choice option but does not know the name of any particular attorney whom he wants to choose. In that case the presiding magistrate or judge will first have to set a time within which the

defendant must make his choice and inform the court of the name of the attorney he has chosen.¹²⁶ In addition, the presiding officer presumably will have to give the defendant the names of the attorneys eligible and available for appointment and will have to explain in clear terms where the defendant will be able to get information about each of those lawyers.¹²⁷ Finally, the presiding officer will have to make sure that the defendant has access to a form that will enable him to list, in order of preference, the names of the lawyers (up to a certain maximum) whom he has decided to choose. If the defendant communicates those choices to the court within the applicable time limit, the court presumably would forward that paperwork to the Office of Court Administration, so that the first of the available lawyers on the defendant's list can be appointed. But if the defendant does not make a selection within the allotted time, the court presumably would have to notify the Office of Court Administration accordingly, so that counsel can be assigned to the case (presumably according to the usual pre-choice procedure) within the time limits allowed under Texas law.

ii. Attorney Eligibility

Legal services are not provided in an entirely free market, of course, because representation is restricted to attorneys in good standing who have been admitted to the local bar. Subject to that restriction, however, a client with the means to retain counsel can hire any lawyer admitted to practice in the jurisdiction. Attorneys who represent indigent defendants, however, are typically chosen from a pre-determined list of those whom judges or court officials consider competent to serve, and, as previously described,¹²⁸ this has long been the practice in Comal County. A key threshold question in implementing client choice is whether to limit client-choice to attorneys eligible for appointment in the prior system, or instead to put indigents in a position identical to that of non-indigent defendants, by permitting them to select any attorney admitted to the bar.

The underlying principle of client choice pushes strongly in the latter direction (permitting indigents to select any lawyer admitted to the bar), but there are practical reasons to consider modifying that approach. For example, the local bar, though generally supportive of the pilot project, noted that client-choice could prove unworkable in cases involving alleged sexual abuse of children.¹²⁹ Such

¹²⁶ For explanation of the deadline for exercising the choice option, *see infra* text accompanying note 139.

¹²⁷ For explanation of how information about eligible attorneys is communicated to defendants, *see infra* text accompanying notes 136–39.

¹²⁸ *See supra* pp. 55–56.

¹²⁹ *E.g.*, TEX. PENAL CODE ANN. §§ 21.02 (Vernon 2011) (Continuous Sexual Abuse of Young Child or Children); 21.11 (Indecency with a Child); 21.12 (Improper Relationship Between Educator and Student) 22.011 (2) (Sexual Assault of a Child); and 22.021(a)(1)(B) (Aggravated Sexual Assault of a Child).

cases can be exceptionally time-consuming and emotionally draining. The lawyers pointed out that in a client-choice system, any lawyer who successfully represented a defendant in such a case would soon find himself or herself selected over and over by defendants facing similar charges. Yet the lawyers who accept indigent defense appointments would not want to be appointed again soon in another case involving alleged sexual abuse of a child. Accordingly, there is good reason to eliminate the client-choice option for this one category of extraordinarily difficult cases.¹³⁰ With respect to all other cases on the docket, theory would suggest attempting to approximate a pure “free market” by permitting indigent defendants to select any attorney admitted to the bar. But many local stakeholders expressed concern that this approach might bring into the system large numbers of incompetent lawyers or those unfamiliar with local practice.¹³¹

In addition, the “any-lawyer” approach could become a source of drastic delay. Defendants would need considerable time to gather information about a list of lawyers that could potentially extend to all members of the bar. And even after a defendant had informed himself, he would not know which of these lawyers were actually willing to accept indigent cases for payment under the county’s fee schedule. The “any-lawyer” approach could produce a situation in which defendants might be repeatedly rebuffed by attorneys unwilling to take on their cases, and such defendants could in turn become quite frustrated. Even if the choice option did not backfire in that way, a defendant’s lack of immediate success in locating a willing attorney presumably would require repeated continuances until a lawyer-client relationship could be established. Such delay would disrupt the court docket under the best of circumstances, and (absent some procedural work-around) would run afoul of Texas’s requirement that counsel for indigent defendants be appointed, at the latest, within three business days of first appearance.¹³²

Accordingly, there appear to be strong practical reasons to permit client choice only within the parameters of the already-established attorney-eligibility lists. In that event, indigent defendants would receive at their first appearance the list of attorneys eligible for appointment in their case.¹³³ Presumably, attorneys who are temporarily unable to accept new cases would inform the Office of Court Administration to that effect, so that their names could be temporarily removed

¹³⁰ Capital murder cases obviously present great difficulty as well, but they would not be eligible for the Comal County client-choice program in any event, because counsel for indigent capital defendants are assigned through regional appointment process outside the framework of the Comal County indigent defense plan.

¹³¹ As a recreational area that draws from nearby Austin and San Antonio, Comal often has indigent defendant from neighboring counties who, in a regime of unrestricted choice, might well select an attorney from outside Comal.

¹³² TEX. CODE CRIM. PROC. ANN. art 1.051. For further discussion of the timing issue, see *infra* text accompanying note 139–40.

¹³³ See *supra* text accompanying note 127.

from the list; their names could be restored when they inform the court that they are once again able to accept appointments.

This approach would guarantee that any attorney chosen by the indigent defendant will be no less competent (on average) than the attorney who would have been appointed under a no-choice system. Because all attorneys on the list are by definition well-qualified (in the judgment of court officials), the use of the pre-screened list would obviate the frequently voiced objection that ill-informed defendants in a client-choice system will make poor choices or be exploited by unscrupulous attorneys trolling for indigent defense business.¹³⁴ And because all attorneys on the list would be willing to accept indigent appointments, the pre-screened list, continuously updated, would ensure that defendants could not “all flock to one lawyer.”¹³⁵

iii. Informed Choice

In the ordinary market for legal services, including criminal defense services, the non-indigent client is largely on his own in seeking to gather information about the competence and comparative strengths of different lawyers, as well as their likely cost. Lawyer advertising and bar association websites may provide some resources, but these are typically quite limited. A defendant’s prior experience (if any), word of mouth, and (perhaps) a pre-retention interview with an attorney who is under consideration are the prospective client’s only guides. However imperfect, this is the world that consumers of legal services, like all other consumers, typically must navigate.

This approach offers many attractions in a client-choice system: It gets court officials out of the business of determining how much information to provide and avoids any need for them to screen it for accuracy; it also places the indigent defendant in exactly the same position as the defendant of means, at least in theory. Again, however, practical considerations can make this approach complicated or unworkable. Defendants remanded to jail, as many indigent defendants are,¹³⁶ have limited ability to make phone calls, access the internet or consult with family or friends. Family may have limited opportunity to gather information on the

¹³⁴ See *supra* text accompanying notes 84–90.

¹³⁵ *United States v. Ely*, 719 F.2d 902, 905 (7th Cir. 1983) (advancing this objection to a client-choice option).

¹³⁶ In principle, eligibility for release on bond and eligibility for appointment of counsel are separate issues; indeed Texas law mandates that the official who makes the indigency determination “may not consider whether the defendant has posted or is capable of posting bail, except to the extent that [this] reflects the defendant’s financial circumstances as measured by the [permissible] considerations listed in this subsection [i.e., the defendant’s income, assets, financial responsibilities, etc.].” TEX. CODE CRIM. PROC. ANN. art. 26.04(m) (Vernon 2014). In practice, however, defendants who post bail typically do not qualify for appointed counsel, and conversely, those who do qualify typically fail to make bail, at least initially.

defendant's behalf. And meanwhile the clock is ticking, because as mentioned,¹³⁷ Texas law requires that counsel for the indigent be appointed within three business days following first appearance.

These concerns suggest the value of some limited degree of court involvement in compiling relevant information. One readily workable alternative would be for officials to compile a notebook containing basic information about each attorney eligible for appointment. Separate color-coded notebooks could be compiled for each of the A, B and C Lists, with pages removed when individual attorneys declare themselves temporarily unavailable and then re-inserted when such attorneys report that they are once again willing to accept appointments.

This approach, however, precipitates a difficult decision concerning the level of detail that the notebooks should provide. In principle, the more information, the better. It therefore might seem that eligible attorneys should be free to provide whatever information they deem appropriate about themselves, their experience, and their philosophy of representation. Indeed, the need for comprehensive information is heightened by the fact that—given the low rates of indigent defense compensation—many attorneys might be unwilling to make time for a pre-selection client interview at the jail or even at their offices (for defendants not detained prior to trial).

Nonetheless, a thick notebook binder containing detailed information of this sort could quickly prove unmanageable or frustrating to defendants. If each indigent defendant is to be given his own thick binder, dozens of binders might have to be available at any one time. But that merely logistical problem would be less of an obstacle than the concern that a conventional ring binder could prove dangerous in the hands of a jail inmate who might easily fashion it into a weapon if he were allowed to take the binder back to his own cell. Practical considerations therefore weigh heavily against giving each indigent defendant his own copy of such a binder; defendants presumably would need to consult the county's own copy (or copies) at the courthouse before release on bond or at the jail if remanded to custody.

A system affording defendants a place to consult a County-maintained information binder seems sensible, but it raises further questions. The Comal County jail has a "Library" suitable for inmates to use for this purpose, but the room can accommodate only a maximum of five inmates at a time. Jail officials presumably could allow inmates to make notes from the binder, but given the limited number of inmates who can use the library at any one time, some time limit inevitably would have to be imposed - for example, allowing each inmate no more than about twenty minutes at a time to examine the appropriate binder in the Library. The limited space and time that could be made available for consulting the information binders then makes it imperative to present the relevant information in a concise format. The need for selectivity in the information

¹³⁷ See *infra* text accompanying note 139.

presented is compounded, moreover, by the fact that for security reasons, attorney information sheets longer than one page for each attorney presumably would have to be discouraged, in order to avoid the need for staples or paper clips - again, a security concern with respect to defendants detained prior to trial.

Under these conditions, the amount of information that can be provided to defendants in custody is likely to prove far from ideal. A plausible compromise, for example, would be an approach in which each sheet would contain only basic information provided by the attorney in question: Name, office address, email address,¹³⁸ internet website (if any), law school attended, year of graduation, year of admission to the Texas bar and whether any disciplinary charges have been upheld or are currently pending. The sheet could provide a place for the attorney to indicate the percentage of practice devoted to indigent criminal defense and to all criminal cases, and the number of bench and jury trials in which the attorney has personally participated. Finally, a small space (a few lines) could be made available for the attorney to explain why he or she accepts the cases of criminal defendants who are unable to afford to hire their own lawyer. In addition, of course, defendants in custody are in close contact with fellow inmates who presumably will already have met their attorney and, in some cases, will already have an impression of how their attorney handled their case through to completion.

Whether constraints on the amount of information provided and the conditions for consulting it will drain the client-choice option of value in the eyes of indigent defendants necessarily remains to be seen. It seems plausible to hope, however, that despite such limitations, client choice can nonetheless afford indigent defendants a feeling of greater control over their cases and greater trust in their attorneys than they would have in the absence of any choice at all.

iv. Time Limitations on the Exercise of Choice

Under the Texas Code of Criminal Procedure, when an indigent defendant requests the appointment of counsel, “a court or the court’s designee . . . shall appoint counsel . . . not later than the end of the third working day after the date on which the court or the court’s designee receives the defendant’s request for appointment of counsel.”¹³⁹ The allowable time is clearly too short for extensive research into attorney reputation or for a series of pre-selection interviews. For that reason, a jurisdiction committed to client choice could conceivably decide either to amend that kind of rule, allow the defendant to waive the three-day limit, or find a flexible way to interpret the timing of the “request for counsel” that starts the three-day period running. On the other hand, many judges and criminal defense practitioners strongly believe that prompt appointment of counsel is

¹³⁸ It might prove desirable to omit the attorney’s phone number, because attorneys often are unwilling to accept collect calls from defendants in custody.

¹³⁹ TEX. CODE CRIM. PROC. ANN. art 1.051 (Vernon 2007).

imperative and therefore that the allowable time period should be short and unwaivable.

Once that choice is made, defendants inevitably will have only a limited window in which to gather information and make their selection. A tight time limit insures that if a defendant proves unable to select his preferred attorney promptly, the court will still have time to make the attorney appointment itself, under pre-choice procedures, without running afoul of the three-day limit. Arguably, defendants should be afforded only 24 hours to make their selection, in order to leave maximum flexibility for appointment by the Office of Court Administration, should that prove necessary. But because such a narrow window would undercut the goal of affording defendants a genuine sense of choice, it would presumably be more prudent, and yet sufficiently workable, to allow defendants 48 hours to exercise the choice option.

To implement such an arrangement, defendants who are released pending trial presumably will have to be instructed to return their attorney-selection form, filled out with the names of their preferred attorneys, by the 48 hour deadline, so that the Office of Court Administration can appoint the first of the selected attorneys who is able to serve. If a defendant released before trial fails to return his attorney-selection form in time, the court presumably would then have to assign an attorney in accordance with the ordinary pre-choice procedure.

The process for defendants remanded to jail presumably would be similar. Detained defendants would be instructed to return their completed attorney-selection form to a designated official at the jail by the 48 hour deadline. However, if a defendant makes bond and qualifies for release before the deadline expires, the completed form presumably should be collected when he is discharged from custody or—if his choice has not yet been made—the defendant presumably would have to be instructed to return a completed form to the court within the allotted time. Like defendants released before trial, a defendant in detention who fails to complete and return his attorney-selection form by the applicable deadline would be assigned an attorney in accordance with the ordinary pre-choice procedure.

As in the case of the constraints on the amount of information provided, the limitations on the time available for selecting an attorney could conceivably foster resentment among indigent defendants and undercut some of the promise of the client-choice approach. But indigent defendants detained prior to trial presumably will have a strong incentive to gather information about attorneys right away and complete their selection forms promptly. Many of the local Comal County stakeholders are optimistic that indigent defendants will view the chance to choose their lawyer as an option of real value. It remains to be seen, however, whether or to what extent a less favorable perception outcome will materialize among indigent clients.

4. Evaluation of Client-Choice

In order to assess the impact of client choice on indigent clients, on the attorney-client relationship and on the justice system as a whole, the pilot project includes a plan for collecting data about case management and client perceptions of the process, with respect to both cases initiated before the choice option went live and those initiated in the new regime where client-choice is to be available. In addition to recording variables pertaining to case outcome, processing times and costs for assigned-counsel representation, the survey will ask all defendants a series of questions designed to elicit measures of attorney commitment and effort.¹⁴⁰

Data will be collected, for example, concerning such relatively objective matters as how soon and how often defendants' lawyers met with them; whether their lawyer returned their calls quickly and met with them when asked; whether the lawyer took time to get to know them; and whether the lawyer asked their opinion about the case. The survey will also pose questions to draw out subjective impressions of attorney performance, not only defendants' overall satisfaction with the representation they were afforded, but also whether they felt their lawyer worked hard; took time to listen to them; explained clearly what was happening and kept them informed; took their opinions into account; and treated them with respect. Finally, data will also be collected to probe defendants' perceptions of the justice system in general: for example, whether they feel that judges and courts can be trusted and whether they think people should accept judicial decisions even when they disagree with them.

It should soon prove possible to determine with some degree of empirical certainty whether the theoretical merits of client-choice are borne out in practice in the setting of a court system like that of Comal County.

IV. LOOKING FORWARD

A rigorous assessment of all costs and benefits of client choice in Comal County will necessarily have to await completion of the ambitious plan of data collection and analysis mandated by TIDC. Even before that verdict is in, however, the initial implementation efforts in Comal should already suffice to put to rest one of the principal reservations about a client choice regime—the concern that it will necessitate overly complex paperwork and case processing measures. The preceding discussion of the necessary implementation measures and the policy decisions to be made with respect to them demonstrates that there is nothing intrinsically infeasible about a client choice option in indigent defense. Indeed, the

¹⁴⁰ Defendants whose cases are initiated *after* the choice option goes into effect will also be asked whether they found it easy to get adequate information about the attorneys who were available and whether they found it easy to decide which attorney they wanted.

foregoing suggestions concerning the pertinent paperwork and case flow details, the procedures for furnishing information to indigent defendants and the steps necessary for defendants to exercise and communicate their choice provide a template that can readily be adapted and adopted elsewhere.

In two respects, the Comal setting differs in potentially significant ways from that of many other American jurisdictions. First, average attorney fees per case have been quite low.¹⁴¹ Accordingly, private attorneys may be less strongly motivated in Comal than elsewhere to seek and retain indigent clients. To that extent, whatever benefits for clients ultimately result from Comal's client-choice regime, it would be plausible to expect even greater benefits in jurisdictions where defense attorneys for the indigent are more generously compensated.

A second difference has more complex implications. As a jurisdiction that makes no use of a public defender, Comal does not face a prospect that many supporters of indigent defense and county officials elsewhere fear—that a choice option will trigger headlong flight of indigent clients away from representation by highly competent public defenders. Nonetheless, that prospect does not by any means represent a flaw in the client-choice model. First, making choice available might demonstrate that such fears are groundless. If client flight did not materialize, we would have a clear sign that public defenders were succeeding in one of their primary missions—either because they had been doing so all along or because the choice option served in itself to enhance their performance and the trust of their clients. Conversely, even if flight were to occur, that outcome would not indicate any weakness in the client-choice principle. To the contrary, to attribute client flight to defects in the choice concept would be equivalent to blaming the messenger for bad news. Client flight triggered by the opt-out opportunity afforded to indigents in a client-choice regime would provide a vivid measure of dissatisfaction or mistrust among public defender clients and a strong signal that they, themselves, felt their interests would be better represented in a different counsel-assignment system.

Even while we await final analysis of the “before” and “after” data generated by the Comal project, therefore, it is not too soon for officials responsible for indigent defense elsewhere to begin considering the possibility of instituting a client-choice model in their own jurisdictions.

¹⁴¹ See *supra* text accompanying notes 116–20.